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No. 10-

IN THE SUPREME COURT OF THE UNITED STATES

LISA MILLER,
Petitioner
v.
JANET JENKINS,
Respondent

On Petition for Writ of Certiorari to the Virginia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the full faith and credit obligation under the United States Constitution requires Virginia to *enforce*, as distinct from register, a foreign order arising out of a same-sex union treated as marriage when Virginia law declares such orders void and unenforceable.

2. Whether the full faith and credit obligation under the United States Constitution requires Virginia to *enforce*, as distinct from register, a foreign order that is patently unconstitutional insofar as it fails to afford a fit, biological parent the constitutionally guaranteed minimum of process due before a third party can be declared a parent to the child.

3. Whether Virginia can refuse to enforce a foreign custody order arising from a same-sex relationship under the time, manner, and mechanism exception to full faith and credit recognized in *Baker v. General Motors Corp.*, 522 U.S. 222 (1998).

4. Whether the full faith and credit obligation under the United States Constitution requires Virginia to *enforce*, as distinct from register, a foreign order that is patently unconstitutional insofar as it retroactively strips a fit, biological parent of her fundamental parental rights.

5. Whether the full faith and credit obligation under the United States Constitution requires Virginia to *enforce*, as distinct from register, a foreign order that results in a violation of the equal protection clause insofar as it treats similarly situated, fit, biological parents differently.

6. Whether the Virginia courts erred in concluding that the law of the case doctrine barred litigation of the question of enforcement when the prior litigation necessarily involved only issues of jurisdiction and registration.

7. Whether application of the law of the case doctrine to bar a party from litigating an issue that was not previously raised in prior litigation between the parties violates the federal guarantee of due process.

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JURISDICTION

The opinion of the Virginia Supreme Court was filed on May 5, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Full Faith and Credit Clause to the United States Constitution; the Fourteenth Amendment to the United States Constitution; the Full Faith and Credit Act, 28 U.S.C.A. § 1738; the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (PKPA); the Defense of Marriage Act, 28 U.S.C. § 1738C (DOMA); the Virginia Constitution, article I, § 15-A; and Va. Code §§ 20-45.3, 20-146.26, and 20-146.27. The constitutional and statutory provisions involved are each set out, in relevant part, verbatim with appropriate citations in Appendices N through U. (App. 149a-162a).

STATEMENT OF THE CASE

This case presents two related, but independent, substantial federal issues: the sovereignty of one state to refuse to *enforce*, as distinct from register, foreign custody orders arising from a same-sex civil union treated as marriage, and whether a receiving state must enforce foreign custody orders that are patently unconstitutional. These issues are unsettled and lower courts have reached conflicting results about them. This Court needs to settle the issues and provide clarity and direction to this important area of law.

First, this case concerns the clash between two conflicting state laws and the sovereign authority of one state to refuse to *enforce* a foreign custody order that is deemed void and unenforceable under the laws of the receiving state. Vermont authorizes same-sex civil unions. Virginia declares such relationships void and unenforceable. Although this Court has held that the full faith and credit clause requires the receiving state to give full faith and credit (*i.e.*, give res judicata effect) to foreign orders, there are limits to which a state can be required to enforce a foreign order that is unenforceable under the laws of the receiving state. According to *Baker v. General Motors*, 522 U.S. 222 (1998), a receiving state is only obligated to *enforce* the foreign order according to the time, manner, and mechanisms of the receiving state. Where, as here, the laws of Virginia provide that such an order cannot be enforced at any time, in any manner, or by any mechanism, it is unenforceable.

The PKPA does not change the outcome. Although

the PKPA generally requires one state to recognize a sister state's custody order, it cannot require enforcement under all circumstances because, as this Court has acknowledged, there are exceptions to enforcement embodied within the full faith and credit obligation. Indeed, DOMA codified a state's authority to refuse to give effect to orders that arise out of same-sex relationships treated as marriage. At issue here is the scope of the full faith and credit obligation and, more specifically, the sovereign authority of a state to refuse to enforce a foreign domestic relations order that is declared void and unenforceable in the receiving state.

Second, this case involves the sovereign authority of a receiving state to refuse to enforce a patently unconstitutional foreign order. The Vermont custody order at issue is unconstitutional insofar as it fails to afford a fit, biological parent the constitutionally guaranteed minimum of process due before declaring a third party to be a parent and because it retroactively strips a fit biological parent of her fundamental parental rights by creating a new parentage rule and using it to determine parentage of a child born two years earlier in another state.

Statement of Facts

In December 2000, while Virginia residents, Lisa and Janet traveled to Vermont to enter into a same-sex civil union and immediately returned to Virginia. (App. 82a). In 2001, Lisa was artificially inseminated *in Virginia*, by a Virginia doctor, with sperm from an anonymous donor. *Id.* Lisa gave birth to Isabella *in*

Virginia in April 2002 and is the sole parent on Isabella's Virginia birth certificate. *Id.* In August 2002, all three moved to Vermont. *Id. Janet never adopted Isabella, even though Vermont law permitted her to do so.* (App. 109a). When the relationship ended thirteen months later, Lisa returned home to Virginia with Isabella; Janet remained in Vermont. (App. 83a).

In November 2003, Lisa *pro se* filed forms in Vermont to dissolve her civil union. (App. 83a). Vermont was the only place she could dissolve the civil union because no other state recognized a Vermont civil union as valid.[1] Virginia law, then and now, prohibited same-sex unions. The *pro se* complaint form asked whether there were "biological or adoptive children of said civil union." Lisa listed Isabella in response to that question because she gave birth to Isabella during the civil union. (App. 83a). Janet counterclaimed, seeking full custody of Lisa's biological child, without any allegation that Lisa was an unfit mother.

On June 17, 2004, Vermont issued a "temporary order re: parental rights and responsibilities" (the "Temporary Custody Order") Id. The order awarded Lisa "legal and physical responsibility" for Isabella, and, over Lisa's objection, without deciding whether Janet was a parent to Isabella, granted Janet

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[1] *See, e.g., Rosengarten v. Downes*, 802 A.2d 170 (Conn. Ct. App. 2002) (Connecticut lacked jurisdiction to dissolve Vermont civil union because Connecticut law did not recognize civil unions).

temporary "parent child contact." *Id.* Lisa was ordered to give Janet unsupervised visitation with then two-year old Isabella in Vermont. *Id.*

On July 1, 2004, Lisa filed a petition in Virginia, asking the court to declare her Isabella's sole parent under Virginia's assisted fertilization statute (the "Parentage Case"). (App. 83a). On September 9, 2004, a Virginia circuit court found that nothing in the PKPA precluded it from exercising jurisdiction over a *parentage* action, as distinct from a custody proceeding. (App. 74a). In addition, the court found: "Any claim of parentage by Respondent under Vermont law is necessarily based on Respondent's civil union with Petitioner," and any such rights are null and void under Virginia law. On October 15, 2004, that court entered final judgment of sole parentage in Lisa's favor. *Id.* Janet appealed.

One month *later*, the Vermont family court declared Janet a parent to Isabella. After explaining that "Vermont has not yet been presented with the question of parental status concerning a child born during a marriage [or civil union] and conceived through artificial insemination," *the court created a new parentage rule and applied it retroactively.* (App. 143a). It declared that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and to raise the child as one's own as part of a family unit, not by biology." *Id.* On December 21, 2004, the Vermont trial court refused to give full faith and credit to the Virginia parentage order, which was entered one month *before* the

Vermont court reached the issue. The Vermont Supreme Court affirmed the district court's parentage and visitation rulings and remanded the case to finally determine custody and visitation. (App. 126a). After briefing was completed to the Virginia Court of Appeals in the Parentage Case, in March 2005, Janet sought to register, *but not enforce*, the Vermont temporary order in Virginia (the "Registration Case"). On August 8, 2005, the Juvenile & Domestic Relations (J&DR) Court registered the order. (App. 51a). On March 1, 2006, the circuit court reversed, concluding that Virginia law prohibited registration of the order. *Id.*

On November 28, 2006, the Court of Appeals reversed the circuit court's decision in the *Parentage* Case. Resting entirely on its interpretation of two federal statutes, the panel concluded that, despite Virginia's statutory prohibition against recognizing any rights flowing from same-sex unions, "the PKPA prevented its exercise of jurisdiction and required it to give full faith and credit to the custody and visitation orders of the Vermont court."(App. 70a).

Relying on the reasoning in its decision in the Parentage Case, on April 17, 2007, the Court of Appeals summarily vacated the March 1, 2006 circuit court order in the *Registration* Case, remanding with instructions to register the Vermont temporary order. (App. 40a) ("In light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case.").

On June 6, 2008, the Virginia Supreme Court affirmed the decision in the Registration Case, refusing to reach the merits because it determined

that the lower court's November 2006 decision in the *Parentage* Case was law of the case as to all issues raised in the *Registration* Case. *See* (App. 36a). Chief Justice Hassell, while concurring in the judgment regarding law of the case, noted that on the merits, the decision of the Court of Appeals in the Parentage Case was incorrect. (App. 37a).

This appeal arises from a January 14, 2009 order of the Frederick County J&DR Court in which the court registered a November 7, 2008 Vermont custody order and directed that it shall be *enforced* in Virginia. (App. 25a) (the "Enforcement Case"). On March 16, 2009, the circuit court affirmed the J & DR order, concluding that the PKPA requires the court to register and *enforce* the Vermont order and that neither the MAA nor Marriage Amendment "bars registration and enforcement of the Vermont Order because both are preempted by the PKPA." (App. 18a). On February 23, 2010, the Court of Appeals issued an order concluding that the law of the case doctrine prevented it from deciding the enforcement issue even though the enforcement question was indisputably *not* part of the prior litigation between the parties because Janet specifically chose *not* to litigate the enforcement issue in the prior litigation. (App. 16a). On May 5, 2010, the Virginia Supreme Court dismissed the petition for appeal based on its determination that the case did not involve a "substantial constitutional question as a determinative issue or matters of significant precedential value . . . ." (App. 1a; VA Code § 17.1-410 at App. 1a).

The court of appeals order, which the Virginia

Supreme Court declined to review, is the subject of this Petition. This Court should grant *certiorari* and reverse on the merits.

Federal Questions Presented in State Proceedings

At every stage in the litigation, Lisa presented the issues raised in this Petition. Specifically, she argued that the full faith and credit obligation, despite the PKPA, does not require enforcement of the Vermont order in Virginia and that Virginia is not required to enforce unconstitutional orders. Although each opinion below addressed the full faith and credit issue, no court addressed Lisa's constitutional arguments. (Excerpts of the state court briefs are set forth at App. V).

REASONS FOR GRANTING THE WRIT

This Petition should be granted for two reasons. First, this case involves an important question of federal law that has not been, but should be, decided by this Court concerning the scope and effect of the full faith and credit obligation in the context of a foreign child custody order that is deemed void and unenforceable in the receiving state. And second, whether a state must enforce a foreign custody order that unconstitutionally infringes the procedural and substantive due process rights of the fit, biological parent. In the past few years, Florida, Texas, Alabama, Virginia, Louisiana, and Oklahoma have been asked to decide whether they will recognize or

enforce foreign orders arising out of custody or adoption proceedings between same-sex couples.

DOMA recognizes state sovereignty under the Full Faith and Credit (FFC) Clause so that one state is not directly or indirectly compelled by a sister state to enforce same-sex marriage, same-sex relationships treated as marriage, or any rights arising therefrom. Confusion over the PKPA and DOMA caused the courts below to declare that (i) Virginia *had no choice* but to enforce the foreign order despite Virginia's express prohibition against enforcement of any rights arising from same-sex unions and (ii) there was no constitutional distinction between registration and enforcement.

In passing DOMA, Congress invoked its authority under the FFC to prescribe "what (if any) effect" states must give to "any public act, record, or judicial proceeding . . . respecting a relationship between persons of the same-sex that is treated as marriage under the laws of such other state . . . or a right or claim arising from such relationship." 28 U.S.C. § 1738C; H.R. Rep. 104-664, at 27, 1996 U.S.C.C.A.N. 2905, 2932. DOMA provides that each state can determine what legal effect to give to: (a) same-sex marriages or same-sex relationships treated as marriage, but not called marriage; and (b) rights or claims arising from those same-sex marriages or relationships.

More than forty states have enacted laws or passed constitutional amendments prohibiting legal recognition and/or enforcement of same-sex unions. Confused over the scope and effect of the PKPA, the Virginia courts eviscerated the protections afforded

Virginia under DOMA and Virginia law by interpreting the PKPA to impose a *per se* obligation to enforce foreign child custody determinations even where such rights arise from a same-sex relationship treated as marriage and deemed void and unenforceable under Virginia law. The PKPA's scope, however, is not that expansive.

The PKPA does not require a state to enforce orders arising from a same-sex civil union treated as marriage when the receiving state's laws declare those rights void in all respects. This Court should resolve the important federal questions concerning the proper interpretation of the FFC Clause, the PKPA, and DOMA to prevent further interstate conflicts in matters of traditional state concern.

The writ should also be granted to resolve the question of whether a receiving state must enforce a patently unconstitutional order. At the heart of that issue is a pervasive split among the states on the scope of federal parental rights after *Troxel v. Granville*, 530 U.S. 57 (2000). At least twelve states, including Vermont, have judicially appointed *de facto* or psychological parents over the objections of fit, biological parents and, in the process, rejecting or wholly ignoring federal constitutional claims of parentage rights. At least twelve states have reached the opposite conclusion on the scope of parents' federal constitutional rights to exclusive control over custody and visitation decisions. The important questions of federal law concerning both the substantive and procedural rights of fit, biological parents in the face of claims of parentage rights by third parties should be settled by this Court. To the

extent the Vermont order violated Lisa's parental rights by failing to give *any* deference whatsoever to Lisa's preferences, Virginia should not be required to enforce it as a valid order.

It bears emphasis that the case is *not* a domestic relations case. Lisa does not ask this Court to issue a divorce decree, decide custody, or award alimony. Rather, Lisa asks the Court to clarify the scope and effect of the PKPA and DOMA in order to prevent further interstate conflicts involving custody of young children.[2] *See, e.g., In re A.K. v. N.B.*, no. 1080440, __ So. 2d __, 2010 WL 2629064, at *5 (Ala. June 30, 2010) ("questions regarding the [child custody] judgment of the California trial court and its enforceability in Alabama may exist in light of the unequivocal nature of Alabama public policy on the issue presented by this case"). Confusion over these two federal statutes has embroiled Virginia and Vermont in more than six years of litigation, most of which could have been avoided with guidance from this Court on the proper interpretation of the federal statutes and constitution. Given the increasing number of states treating same-sex unions as marriage, expressly prohibiting recognition or enforcement of those unions, or declaring third

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[2] Although this case does not present an "intractable jurisdictional deadlock[]," review should nevertheless be granted. *See Thompson v. Thompson*, 484 U.S. 174, 187 (1988). The case involves an important, recurring, question of federal law that needs to be settled.

parties *de facto* parents, the federal issues presented are of nationwide significance and urgency.

I.

A PERVASIVE CONFLICT EXISTS AMONG THE STATES CONCERNING THE PARENTAL RIGHTS OF FIT, BIOLOGICAL PARENTS.

At the heart of this interstate dispute is a significant conflict among the state courts regarding the fundamental rights of a fit, biological parent. Vermont's decision to grant parental rights to a legal stranger highlights the results of that pervasive split. Courts in at least twelve states, including Vermont in Lisa's case, have ignored or rejected federal constitutional parentage rights' claims pressed by biological parents in the face of claims to *parentage* rights by third parties, declaring the third parties *de facto* or psychological parents. On the other hand, at least sixteen states grant rights to *de facto* parents, psychological parents, or people who stand *in loco parentis* to the child, over the federal constitutional objection of the child's fit, biological or adoptive parent. *See, e.g.*, *Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004); *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C.

Ct. App. 2008); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *In re Custody of H.S.H.K.*, 533 N.W.2d 419 (Wis. 1995); *Clifford K. v. Paula S.*, 619 S.E.2d 138 (W. Va. 2005). *But see Brewer v. Brewer*, 533 S.E.2d 541 (N.C. Ct. App. 2000) (rejecting claim to *de facto* parent status). Other courts simply ignore the constitutional argument altogether. *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992); *T.B. v. L.R.M.*, 874 A.2d 34 (Pa. Super. Ct. 2005).

On the other hand, courts in at least twleve states have held that a nonparent does not obtain custodial rights or decision-making authority simply because the nonparent has strong emotional bonds with the natural parent's child, even where such bonds were encouraged and facilitated by the biological parent. *See, e.g.*, *Kazmierazak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005); *In re Visitation with C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999); *Petition of Ash*, 507 N.W.2d 400 (Iowa 1993); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008); *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995); *In re Nelson*, 825 A.2d 501 (N.H. 2003); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999); *Coons-Andersen v. Andersen*, 104 S.W.3d 630 (Tex. Ct. App. 2003); *Stadter v. Siperko*,

661 S.E.2d 494 (Va. Ct. App. 2008); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007). *But see Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 508-509 (N.Y. Sup. Ct. 2008) (refusing to follow binding New York precedent, instead finding biological parent is equitably estopped to deny former same-sex partner has standing to seek custody). Until its decision in the litigation between these parties, the Vermont Supreme Court had also refused to recognize custodial rights of third-parties who had not adopted the child, *see Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997), or to judicially expand the definition of parent to include alleged psychological parents, *In re J.M.*, 750 A.2d 442 (Vt. 2000).

There are also conflicts among the states as to whether the third party seeking parentage rights over the objections of the fit biological mother must merely demonstrate such a determination is in the best interests of the child or that absent such a determination, some actual harm will befall the child's health and welfare. *Compare In re Parentage of L.B.*, 122 P.3d 161, 171-72 (Wash. 2005) (broad equitable powers to act in accord with welfare of the child); *In re Custody of H.S.H.K.*, 533 N.W.2d 419, 440-42 (Wis. 1995) (courts have equitable power to do what is in the best interest of the child) *with Griffin v. Griffin*, 581 S.E.2d 899, 903 (Va. Ct. App. 2003) (absent showing of actual harm to the child, the constitutional liberty interests of fit parents take precedence over the best interests of the child); *Roth v. Weston*, 789 A.2d 431, 450 (Conn. 2002) (denial of visitation must cause real and significant harm to the

child); *Clark v. Wade*, 544 S.E.2d 99, 100 (Ga. 2001) (to construe custody statute constitutionally, showing of harm to the child is required).

Ironically, Virginia is now required to register and enforce the Vermont order even though Virginia is one of states that has refused to grant parentage rights to *de facto* parents who have no legal relationship to the child. Virginia has affirmed the constitutional rights of fit, biological parents to direct the upbringing of their children. *See Williams v. Williams*, 501 S.E.2d 417 (Va. 1998) (third party must demonstrate harm to the child absent visitation)l *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008) (refusing to grant visitation rights to former same-sex partner over the objections of a fit, biological parent); *see also Jones v. Barlow*, 154 P.3d 808, 818 (Utah 2007)(*de facto* parent doctrine interferes with a parent's constitutional right to direct the upbringing of her child).

This Court should grant the Petition to clarify the rights of fit, biological parents after *Troxel v. Granville*, 530 U.S. 57, 98 (2000), in the face of claims to *parentage* rights by legal strangers and to clarify the rights of a state to refuse enforcement of orders from sister states that infringe the fundamental parental rights of fit, biological parents.

For nearly 100 years, this Court has protected a parent's liberty interest in making decisions concerning a child's upbringing. A parent's fundamental right has been described as "perhaps the oldest of the fundamental liberty interests." *Id.* at 65. "It is cardinal . . . that the custody, care and nurture of the child resides first in the parents,

whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Mass.*, 321 U.S. 158, 166 (1944). "The child is not the mere creature of the state . . . ." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

Rejecting a claim brought by grandparents seeking visitation with their grandchildren, *Troxel* stated that, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." 530 U.S. at 68-69. Consistent with *Troxel*, Virginia refuses to grant third party visitation rights without a showing of actual harm to the child. *See Stadter*, 661 S.E.2d at 494 (former same-sex partner sought visitation rights); *see also Craven v. McCrillis*, 868 A.2d 740, 742-43 (Vt. 2005) (grandmother required to present significant evidence of abuse and neglect before court could substitute its judgment for that of fit father, which judgment is presumed valid).

Here, however, Vermont declared Janet a parent *without affording any weight* to Lisa's preferences as the fit, biological mother. (App. 118a). If a third party *visitation* order cannot be granted without a showing of "some special weight," a *parentage* order must be subject to an even more stringent standard. The Vermont orders unconstitutionally interfered with Lisa's decision, as the fit, biological parent, how to raise her child. Given the manifest constitutional

violation, Virginia should not be permitted, much less required, to enforce it as a valid order.

Of course, the constitutional error is manifest in Lisa's case because Vermont sidestepped the difficult constitutional questions by simply declaring Janet to be a co-equal parent with Lisa without performing any constitutional analysis whatsoever or Lisa's decision any deference.

In light of the growing conflict and confusion among the states concerning the parental rights of fit, biological parents *vis a vis* third parties, this Court should address and resolve the conflict.

II.

THE DECISION BELOW RESTS ON A FUNDAMENTAL MISUNDERSTANDING OF THE SCOPE OF THE FULL FAITH AND CREDIT OBLIGATION.

A.

The Full Faith and Credit Obligation Contains a Time, Manner, and Enforcement Exception.

According to the Virginia courts, there is no constitutional difference between registration and enforcement under the Full Faith and Credit Clause. This Court, however, has expressly held that there is a difference. *See Baker*, 522 U.S. 222. While a state is required to give *res judicata* effect to a foreign order, precluding the parties from re-litigating the issues in

another state – a state is not required to *enforce* the order any differently than it would if it were an order issued within the state. Specifically, when a party seeks to *enforce* a foreign order in Virginia, it is *Virginia* law that controls the time, manner, and mechanisms of enforcement. Thus, the foreign custody order arising out of a same-sex relationship can only be *enforced* according to the time, manner, and mechanisms of enforcement available in Virginia. In this case, Virginia law states that the order cannot be enforced at any time, in any manner, or by any mechanism. Virginia courts, however, misunderstood the distinction between registration and enforcement, concluding that they were "essentially" the same. (App. 14a).

The time, manner, and mechanism exception recognized in *Baker* is a longstanding exception to the full faith and credit obligation. *Olmsted v. Olmsted*, 216 U.S. 386, 394 (1910) (while judgment is "conclusive on the merits," it can only be "executed in the latter [state] as its laws permit"); *Fall v. Estin*, 215 U.S. 1 (1909); *Johnson v. Johnson*, 849 N.E.2d 1176, 1179-80 (Ind. Ct. App. 2006). In addition, "[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority." *Baker*, 522 U.S. at 235. For example, a "sister State's decree concerning land ownership in another State has been held ineffective *to transfer title* although such a decree may indeed preclusively adjudicate the rights and obligations running

between the *parties* to the foreign litigation." *Id.* (citations omitted).

Thus, even if Virginia were required to *register*[3] the Vermont order (i.e. give *res judicata* effect), Virginia is not required to *enforce* it to any greater extent than it would be enforced under Virginia law. In the case *sub judice*, Virginia has no mechanism for enforcing custody determinations founded upon parental rights arising from a same-sex union. Virginia is entitled to follow its own laws concerning time, manner, and mechanisms for enforcement. With respect to orders arising out of same-sex relationships, the law is clear: such orders are not enforced at any time, in any manner, or by any mechanism. Virginia law does not carve out any exceptions – any and all rights, benefits, and obligations flowing from same-sex marriage or a same-sex civil union are void. In this case, Virginia does not have any mechanism to enforce parental rights arising from a same-sex union.

To require enforcement of the foreign custody order under these circumstances ignores this Court's historical recognition that core domestic relations matters belong to each individual state. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992) ("the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United

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[3] Lisa also maintains that when the PKPA and DOMA are properly interpreted under Article IV, § 1 of the United States Constitution, they do *not* require Virginia to register *or* enforce the Vermont custody orders.

States").

A recent federal court decision highlights the distinction between enforcement and registration. *See Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (involving recognition of out of state same-sex adoption). In *Finstuen*, the court addressed the question of whether a state law that refused to "*recognize* an adoption by more than one individual of the same sex from any other state or foreign jurisdiction" was constitutional. 496 F.3d at 1141-42 (emphasis added). Although the Tenth Circuit held that Oklahoma's statute prohibiting *recognition* of out of state same-sex adoptions violated the Full Faith and Credit Clause, that decision is entirely consistent with *Baker's* enforcement distinction. Following the logic of *Baker*, the Oklahoma non-recognition statute in *Finstuen* was constitutionally defective because it impermissibly created an exception to *recognition* (*res judicata*), rather than merely refusing to *enforce* an out of state adoption on the same terms as it would refuse to enforce such an adoption within the state. *Finstuen*, 496 F.3d 1155-56 ("The Doels do not seek to *enforce* their adoption order"; "At issue here is a state statute providing for categorical non-recognition"). Since the statute refused to even give *res judicata* effect to sister state orders, consistent with *Baker*, the *Finstuen* court held that it was directly contrary to the Full Faith and Credit Clause. *Id.*

As further evidence of the recognition/enforcement distinction, the *Finstuen* Court explained that the full faith and credit

obligation is not violated if the state applies its law to deny adoptees the right to inherit land or attain similar state rights and privileges. *Id.* (citing *Hood v. McGehee*, 237 U.S. 611, 615 (1915)). Citing the Supreme Court's explanation of the FFC Clause in *Baker*, as well as the provision in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (1969) that "the local law of the forum determines the methods by which a judgment of another state is enforced," the Tenth Circuit emphasized that the FFC Clause does not strip states of their ability to enforce their own laws. *Finstuen*, 496 F.3d at 1154. The plaintiffs were merely asking Oklahoma to apply its own law to their adoption order. *Id.* The *Finstuen* court explained: "Oklahoma continues to exercise authority over the manner in which adoptive relationships should be *enforced* in Oklahoma and the rights and obligations in Oklahoma flowing from an adoptive relationship." *Id.* at 1153 (emphasis added). In other words, if the Oklahoma statute had prohibited *enforcement*, the result would have been different.

Unlike the plaintiffs in *Finstuen*, Janet is seeking to *enforce* the Vermont order in Virginia, which would contravene, not apply, Virginia law. Unlike *Finstuen*, Janet is *not* asking this Court to apply Virginia's laws on the issue but is asking the Court to *violate* state law and the state Constitution. Virginia retains the authority to apply its own laws concerning *enforcement* of a foreign order that grants Janet visitation with (or, as was ordered in November 2009, full custody over) Lisa's biological child based almost exclusively on the fact that Janet

was in a same-sex civil union with Lisa at the time Lisa gave birth to Isabella in Virginia.(App. __) ("[m]any factors are present here that support a conclusion that Janet is a parent, including, **first and foremost**, that Janet and Lisa were in a valid legal union at the time of the child's birth"; "the couple's legal union at the time of the child's birth is *extremely persuasive* evidence of joint parentage" (emphasis added)).

The outcome under Virginia law is clear. Unlike the law in Louisiana that only spoke to non-recognition (or registration as applied to a custody order), Virginia expressly declares rights arising out of a same-sex union as "void" and states they are "unenforceable." Va. Code § 20-45.3. Thus, while *Baker* may require Virginia to *recognize* the Vermont orders (give *res judicata* effect to them through registration), it affirms Virginia's sovereign right to refuse to *enforce* the order because Virginia does not enforce any orders, including child custody orders, arising out of same-sex civil unions.

Nothing in the PKPA dictates a different result. In fact, because the Constitution requires states to give full faith and credit (which the Supreme Court has expressly stated means *res judicata* effect, *not enforcement*), and the Constitution grants Congress authority to provide the manner in which foreign orders shall be proved for such purposes (which authority it invoked in passing the PKPA), Congress lacks constitutional authority to mandate *enforcement* of foreign orders: Congress only has constitutional authority to direct *res judicata* effect. That is particularly true given the express

recognition in DOMA that each state has the sovereign authority to define and regulate marriage and family within its borders. DOMA provides that

> No State . . . shall be required to *give effect* to any public act, record, or judicial proceeding of any other State . . . *respecting* a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim *arising from* such relationship.

28 U.S.C. § 1738C (emphasis added).

DOMA recognizes that "domestic relations are preeminently matters of state law." *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). A House Report from the Judiciary Committee also demonstrates that Congress was concerned about much more than whether a marriage or civil union license would be valid in a second state.

> In the abstract, it is difficult to know precisely what consequences would result if a same-sex couple from, say, Ohio, flew to Hawaii, got "married," returned to Ohio, and demanded that the State or one of its agencies give effect to their Hawaiian "marriage" license. . . . In general, the Committee believes that at least two things would occur.
>
> First, the State law regarding marriage would be thrown into disarray, thereby frustrating the legislative choices made

> by that State that support limiting the institution of marriage to male-female unions. . . . Second, in a more pragmatic sense, homosexual couples would presumably become eligible to receive a range of governmental marital benefits. For example, in *Baehr v. Lewin*, the court listed fourteen specific "rights and benefits" that are available only to married couples (listing benefits related to income tax; public assistance; community property; dower, courtesy [sic], and inheritance; probate; ***child custody*** and support payments; spousal support; premarital agreements; name changes; nonsupport actions; post-divorce rights; evidentiary privileges; and others).

H.R. Rep. 104-664 at 21, n. 21, 1996 U.S.C.C.A.N at 2929 at n.21 (emphasis added) (citations omitted).

In passing DOMA, Congress clarified the scope of a state's sovereign power to define and regulate domestic relations matters involving same-sex unions. Nothing in the *earlier enacted* PKPA exempts it either from the time, manner, and mechanism exception or DOMA's express recognition that each state has the authority to apply its own laws to the *enforcement* of orders arising out of same-sex relationships.

B.

Absent Intervention from this Court, a Handful of States Will Set Marriage Policy for the Nation, in Contravention of the Express Will of Congress.

As properly interpreted, the full faith and credit obligation does not require a state to *enforce* an order contrary to the laws of the receiving state. If other courts follow the Virginia courts' lead, however, state sovereignty on core domestic relations matters will be ceded to the handful of states that has chosen to redefine marriage and parentage.

That result is especially egregious given Virginia's express public policy concerning orders arising out of same-sex relationships. (App. 159a ("Any such civil union . . . ***shall be void in all respects*** in Virginia and any contractual rights created thereby shall be void and unenforceable.")).

Virginia law does not carve out any exceptions – any and all rights, benefits, and obligations flowing from same-sex marriage or a same-sex civil union are void. Vermont same-sex civil unions fall squarely within the scope of DOMA and Virginia's marriage laws. *See* 15 V.S.A. § 1204(a) (Vermont law states that "parties to a civil union shall have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage").

The decision by the Virginia Court of Appeals that the issues raised in prior litigation between the parties concerning *registration* resolves the issues

raised in separate litigation between the parties concerning *enforcement* of the foreign order highlights the confusion that exists over the scope and effect of a state's full faith and credit obligation, as codified in the FFC Act as well as the PKPA and DOMA. (App. 14a-15a). The fact that the Virginia Supreme Court dismissed the petition for appeal as not involving questions of significant precedential value or of a substantial constitutional question magnifies the misunderstanding by the Virginia courts.

The results of this misunderstanding are not only far-reaching but illogical, eviscerating state sovereignty over core domestic relations matters and rendering DOMA virtually meaningless. Absent intervention by this Court, the full faith and credit obligation will incorrectly be interpreted to require sister states to not only give res judicata effect to foreign orders contrary to their own law, including adoption decrees, parentage orders, custody determinations, nuptial agreements, spousal support payments, and child support payments.

When, as here, a federal statute is incorrectly interpreted by state courts to usurp a state's power to regulate the most intimate of domestic relations matters, contrary to the express will of Congress, federal courts must intervene to restore the proper balance of powers. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). Intervention by this Court is necessary to restore to states their power to define *within their borders* what is marriage and who is a parent.

This Court should grant the Petition to resolve the interplay between these federal statutes and

prevent further chaos in the lower courts.

III.

VIRGINIA IS NOT REQUIRED TO ENFORCE PATENTLY UNCONSTITUTIONAL FOREIGN ORDERS

Virginia is not required to enforce patently unconstitutional foreign orders. The Vermont order (i) unconstitutionally infringes Lisa's parental rights and (ii) violates federal due process guarantees by retroactively applying a new parentage rule that strips Lisa of her sole parental rights over her child without any constitutional analysis whatsoever.

Every order issued by Vermont in litigation between the parties has rested on the decision to treat Janet as a parent. The Vermont parentage determination, however, on its face, fails to give any special weight whatsoever to Lisa's preference as the sole, biological parent. In fact, *no constitutional analysis whatsoever was performed* prior to declaring Janet, a legal stranger to the child, to be a parent. As such, the custody and visitation orders, which rest on the unconstitutional parentage determination, fail to afford Lisa a constitutionally guaranteed minimum of process due before a third party can be declared a parent to her child.

Whatever the scope of the full faith and credit obligation, it cannot be interpreted to require a state to *enforce* an unconstitutional order from a sister state as if it were a valid order. A decision by the

Wisconsin Court of Appeals in a child support case is instructive. *In re BWS*, 371 N.W.2d 379 (Wis. Ct. App. 1985). In that case, when a mother sought child support in Wisconsin, the father argued that a Michigan settlement agreement, approved by the court, barred the action. That agreement was based on a Michigan statute authorizing agreements between the biological father and mother in paternity actions that terminated all future support obligations of the father when the child was born to a single mother. Such termination of future support was precluded in agreements concerning a child born during wedlock. The Wisconsin trial court refused to give full faith and credit to the Michigan order. On appeal, the Wisconsin Court of Appeals affirmed, concluding that "Michigan's classification fails to bear an evident and substantial relation to its state interest. . . . '*A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction.*' We see no reason to accord full faith and credit to a judgment obtained in violation of equal protection." *In re BWS*, 371 N.W.2d at 381 (emphasis added) (quoting *Griffin v. Griffin*, 327 U.S. 220, 228 (1946)). In this case, the full faith and credit obligation cannot require Virginia to *enforce* a child custody order that plainly violates Lisa's fundamental parental rights and minimum due process rights

Separately, the Vermont order cannot be enforced because it is based on a retroactive application of a new parentage rule created by the Vermont judiciary in Lisa's case, which infringes Lisa's due process guarantees. The due process and *ex*

post facto clauses "safeguard . . . interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). Both Vermont and Virginia law prohibit retroactive application of civil laws that affect substantive rights. *See* 1 V.S.A. § 213 ("Act of the general assembly . . . shall not affect a suit begun or pending at the time of their passage"); *Potomac Hosp. Corp. v Dillon*, 229 Va. 355, 358-59, 329 S.E.2d 41, 44 (Va. 1985) (substantive and vested rights are included within those interests protected from retroactive application of statutes"). Because the Vermont orders are based on a new parentage rule that was created ex nihilo by the court and then applied retroactively to deprive Lisa of her parental rights, it is unconstitutional. The full faith and credit obligation cannot be interpreted to require Virginia to enforce unconstitutional orders.

It bears emphasis that requiring Virginia to enforce an order declaring a third party to be a parent over the objections of the fit, biological parent would require Virginia to violate the constitution by treating similarly situated same-sex couples differently. A recent decision by the Court of Appeals involving a same-sex custody dispute highlights this constitutional issue. *See Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008). In that case, Christine Stadter and Jennifer Siperko were in a same-sex relationship from May 1999 until the early summer of 2004. On January 2003, Jennifer gave birth to a child. Christine did not adopt the child, because she could not in Virginia. When the

relationship between Christine and Jennifer ended, the child was approximately one and a half years old. In September 2004, Christine filed in Virginia a petition for visitation, to which Jennifer objected. Christine asked the court to grant visitation based on her "asserted status as the child's de facto parent." The court of appeals affirmed the lower court's refusal to grant visitation.

Relying on Virginia Supreme Court precedent that interpreted parental rights under the federal constitution, the court explained that to safeguard a parent's fundamental rights, "courts may grant visitation to a nonparent in contravention of a fit parent's expressed wishes *only when justified by a compelling state interest.*" *Stadter*, 661 S.E.2d at 498 (Emphasis added).

> [C]ompelling state interests in the child's health or welfare will operate to overcome the presumption in favor of a fit biological parent in certain specific circumstances, including where a parent "voluntarily relinquishes" custody and care of a child to a nonparent, or where it has been "established by clear and convincing evidence that there are 'special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent or parents.'"

Id. at 498 (quoting *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986)). Finding no such special facts and circumstances, the trial court refused to grant Christine visitation and the Court of Appeals

affirmed.

The decision to enforce the Vermont order in this case is constitutionally at odds with the holding in *Stadter*. In this case, the Vermont courts declared Janet a parent without any showing of special facts and circumstances or any consideration whatsoever of the biological parent's wishes. Nevertheless, the lower courts in Virginia directed registration and enforcement of an obviously unconstitutional order. Thus, in Virginia, two biological mothers who lived less than three hours apart, are treated differently without any compelling justification for the different treatment. Both women were in a same-sex relationship for five to seven years, both mothers ended their relationship when the child was approximately eighteen months old, and both were Virginia residents at the time the relationship began and at the time the child was born. Nevertheless, in one case, the former partner is *not* entitled to parentage rights because the Virginia courts have held that granting such rights would infringe the biological mother's constitutional rights; while in the other case, a former partner is entitled to parentage rights pursuant to a foreign order that now must be enforced as a valid Virginia order. Under these circumstances, the PKPA, as applied, violates the federal guarantee of equal protection under the law.

IV.

THE VIRGINIA SUPREME COURT'S LAW OF THE CASE DETERMINATION DOES NOT DEPRIVE THIS COURT OF JURISDICTION TO REACH IMPORTANT FEDERAL ISSUES.

A long line of cases establishes this Court's jurisdiction to consider the substantial federal questions raised by Lisa in the lower courts despite the Court of Appeals' ruling that the prior appellate decisions in the Parentage and Registration Cases became law of the case as to the matters raised in the Enforcement Case. This Court said:

> We have jurisdiction to consider all of the substantial federal questions determined in the *earlier stages of state proceedings* and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case.

Reece v. Georgia, 350 U.S. 85, 87 (1955) (citations omitted) (emphasis added).

"The ruling that the former decision of the state court became the law of the case does not affect the power of this court to examine the question." *Davis v. O'Hara*, 266 U.S. 314, 320 (1924); *see also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n.1 (1990) (though court of appeals had invoked the law of the case, "the earlier panel's ruling does not, of course, bind this Court"); *Christiansen v.*

Colt Industries Operating Corp., 486 U.S. 800, 817 (1988) ("a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review"); *Washington ex rel. Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251, 257 (1917) ("this court will not be thus bound" by a state court law of the case determination); *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.) (regarding the law of the case in the lower court, "[o]f course, this court, at least, is free when the case comes here").

This Court's decision in *Davis* is instructive. In that case, defendant appeared specially in the trial court to contest personal and subject matter jurisdiction. The trial court denied the motion. After a jury returned a verdict for defendant, the plaintiff appealed. The Nebraska Supreme Court reversed on the merits, refusing to reach defendant's objection to jurisdiction because defendant failed to file a cross-appeal. On remand, the trial court again overruled defendant's objection to the court's jurisdiction. On appeal to the Nebraska Supreme Court for the second time, the court refused to reach the jurisdictional question, holding that the former trial court decision had become law of the case on that issue.

This Court, however, reversed on the merits of defendant's jurisdictional argument. At the outset, this Court explained that "[t]he ruling that the former decision of the state court became the law of the case does not affect the power of this court to re-examine the question." 266 U.S. at 321. Then this Court reached the merits,ultimately reversing the trial court's determination.

As in *Davis*, so too here the state court's determination in the Enforcement Case that the matters decided by the Virginia courts in the Parentage and Registration Cases are law of the case (which issues, as in *Davis*, were never addressed by the Virginia appellate courts on the first, or second, appeal because the issue was not raised in Janet's petition requesting only registration of a foreign order) does not deprive this Court of jurisdiction to reach the substantial federal issues upon which the opinions below are based.

The fact is, *none* of the prior litigation between the parties involved the question of *enforcement* because Janet made a tactical choice not to request registration *and* enforcement but only registration in the prior litigation. Thus, the November 2006 court of appeals order held that "the issue before us is the narrow one of jurisdiction" and directed that full faith and credit be extended to the Vermont orders. (App. 70a). In the Registration Case, the J&DR Court specifically held that it was "divested of jurisdiction" to decide the *enforcement* question because the circuit court order in the Parentage Case had reserved the enforcement issue to itself. (App. 49a). As a result, each of the subsequent appellate orders in the Registration Case spoke only to the question of registration, *not* enforcement. *See* Circuit Court Order (App. 44a) ("Vermont Order cannot be registered"); Court of Appeals Order (App. 41a) ("remand the case to the trial court to enter an order allowing Janet Miller-Jenkins to register the Vermont order"); Virginia Supreme Court Order (App. 26a) ("In this appeal, we consider whether the

Court of Appeals erred in directing a circuit court to register a custody and visitation order rendered by a Vermont court"). The first time Janet ever sought *enforcement* of a foreign order was November 25, 2008, which led to the order that is the subject of this Petition.

Separately, even if a law of the case determination would normally deprive this Court of jurisdiction, which it does not, Virginia's application of the doctrine below does not constitute an independent and adequate state law ground for the decision. In its June 2008 decision, the Virginia Supreme Court expanded, for the first time, the law of the *case* doctrine to become the law of the *cases*.

For nearly a century, the law of the case doctrine in Virginia provided that, "'[w]here there have been two appeals in the *same* case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal.'" *Steinman v. Clinchfield Coal Corp.*, 93 S.E. 684 (Va. 1917) (emphasis added) (App. 8a (quoting *Steinman*)); *see also Uninsured Employer's Fund v. Thrush*, 496 S.E.2d 57, 59 (Va. 1998). In fact, as Lisa pressed below, neither the parties nor the court identified a single case where issues decided on appeal in one case between the parties were treated as law of the case on an appeal in a *separate* case between the parties. Nevertheless, for the first time, the Virginia Supreme Court applied the law of the case doctrine to refuse to reach the merits in the *Registration* Case because of what was previously decided by the Virginia court of appeals in the *Parentage* Case. In Virginia, the law of the case

doctrine was transformed into the law of the *cases*.

Then, in the Enforcement Case, where Janet was the plaintiff and Lisa the defendant, the court of appeals decision further expanded the law of the case doctrine to cover a substantive issue that was raised, as a result of a litigation strategy made by Janet, in the Enforcement Case. Even though Janet chose not to litigate the question of enforcement in the Registration Case, the court of appeals held that the law of the case doctrine prevented Lisa from raising her enforcement argument in the Enforcement Case.

Because Virginia has not "'strictly or regularly followed'" its newly-minted law of the case doctrine, it does not constitute an independent and adequate state ground barring this Court's review of the underlying federal questions. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (explaining that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed'"); *see also Ford v. Georgia*, 498 U.S. 411, 423 (1991) ("[n]ovelty in procedural requirements cannot be permitted to thwart review"); *cf. Lee v. Kemna*, 534 U.S. 362, 382 (2002) (adequacy determination is a federal question). Such review is particularly appropriate where, as here, the Chief Justice of the Virginia Supreme Court explained in his concurring opinion that he believes the court of appeals was wrong when it held that federal law required Virginia to give full faith and credit to the Vermont order. (App. 37a). He joined the majority opinion, however, because he felt constrained by the law of the case doctrine.

This Court has jurisdiction to decide the federal questions raised by Lisa, which would then prevent the trial court, on remand from the Virginia Supreme Court, from registering the Vermont custody determination based on an incorrect interpretation of the PKPA and DOMA statutes and because it infringes upon the fundamental parental rights of a fit biological parent.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 5th Day of May, 2010.

Lisa Miller,
Appellant,

against

Janet Jenkins,
Appellee

Record No. 100576
Court of Appeals No. 0705-09-4

From the Court of Appeals of Virginia

The Court dismisses the petition for appeal filed in the above-styled case for lack of jurisdiction. Code § 17.1-410 (A) (3) and (B).

A Copy,
Teste:

Patricia L. Harrington, Clerk
By: s/
Deputy Clerk

APPENDIX B

VIRGINIA:
IN THE FREDERICK COUNTY CIRCUIT COURT

Lisa Miller,
Appellant,

v.

Janet Jenkins,
Appellee

CL09000042-00

On appeal from:
JA 013947-02-00F
JJ 018902-01-0F

ORDER

This matter came on for hearing on March 2, 2009 on Appellant Lisa Miller's appeal from the Juvenile and Domestic Relations Court order dated January 14, 2009. Having considered the arguments of counsel, the Court hereby finds that:

1. The Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, requires the Court to register and enforce the Order of the Family Court of Rutland, Vermont dated November 7, 2008 (the

"Vermont Order");

2. Neither the Marriage Affirmation Act, Va. Code § 20-45.3, nor the Marriage Amendment, Va. Const. Art. I, § 15-A, bars the registration and enforcement of the Vermont Order because both are preempted by the PKPA.

For the foregoing reasons, as well as those set forth in the record, it is hereby ORDERED that:

1. The January 14, 2009 order of the Juvenile and Domestic Relations Court is AFFIRMED;

2. The Order of the Family Court of Rutland, Vermont dated November 7, 2008 is registered in accord with Virginia Code § 20-146.26 and shall be enforced pursuant to Virginia Code § 20-146.27.

Dated: 16 March 2009

/s John R. Prosser
The Honorable John R. Prosser
Circuit Court Judge

WE ASK FOR THIS:

/s Rebecca K. Glenberg
Rebecca K. Glenberg (VSB No. 44099)
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Attorney for Janet Jenkins

SEEN AND OBJECTED TO:

/s Rena M. Lindevaldsen

Rena M. Lindevaldsen (VSB No. 70697)
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Attorney for Lisa Miller

APPENDIX C

COURT OF APPEALS OF VIRGINIA
Present: Judges Beales, Alston and Senior Judge Annunziata Argued at Alexandria, Virginia

LISA MILLER
v.
JANET JENKINS
Record No. 0705-09-4

MEMORANDUM OPINION* BY JUDGE RANDOLPH A. BEALES
FEBRUARY 23, 2010

FROM THE CIRCUIT COURT OF FREDERICK COUNTY
John R. Prosser, Judge

Mathew D. Staver (Rena M. Lindevaldsen; Liberty Counsel, on briefs), for appellant.
Gregory R. Nevins (Rebecca K. Glenberg; Lamda Legal Defense & Education Fund, Inc.; American Civil Liberties Union of Virginia Foundation, Inc., on briefs), for appellee.

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* Pursuant to Code § 17.1-413, this

opinion is not designated for publication.

Lisa Miller (appellant) appeals from an order of the Circuit Court of Frederick County granting the request of Janet Jenkins (appellee) that the Frederick County courts register and enforce a Vermont order dated November 7, 2008,[1] directing

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[1] At oral argument, the parties represented to this Court that, since entering the November 7, 2008 visitation order, the registration and enforcement of which is the subject of the appeal in this case, the Vermont court has entered another order, dated November 20, 2009, directing a change in the custody of the child to appellee. As both parties acknowledge, the November 20, 2009 order is not the subject of the appeal currently before this Court – instead, this appeal involves the Frederick County Circuit Court's order of March 16, 2009 that allowed the registration and enforcement of the Vermont court's visitation order entered on November 7, 2008. Of course, as an appellate court of Virginia, we must proceed to consider the issues raised on appeal in relation to the Virginia court's order allowing registration and enforcement of the November 7, 2008 Vermont order rather than issues related to a subsequent order entered by the same out-of-state court.

visitation with a child, I.M.J.[2] After reviewing the record and the previous litigation between these two parties, including the Supreme Court of Virginia's earlier direction to the lower courts in this case, we must find that the trial court correctly required the registration and enforcement of the Vermont order in this case.

I. FACTUAL BACKGROUND

A panel of this Court previously discussed the relationship between these parties in Miller-Jenkins v. Miller-Jenkins, 49 Va. App. 88, 91-94, 637 S.E.2d 330, 332-33 (2006) (hereinafter Miller-Jenkins I). The Supreme Court of Virginia also discussed this background in Miller-Jenkins v. Miller-Jenkins, 276 Va. 19, 22-25, 661 S.E.2d 822, 824-25 (2008) (hereinafter Miller-Jenkins II). We will not discuss these facts yet again here, but instead relate only those facts specifically relevant to this opinion.

On November 7, 2008, a Vermont court entered an order finding appellant in

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[2] As is this Court's practice, initials are substituted for the child's name in an attempt to protect the child's privacy as much as possible.

contempt of court for her failure to abide by a custody and visitation order previously entered by that court. This contempt order also included a specific schedule of visitation for the child, I.M.J., and appellee. Appellee filed a petition with the Frederick County Juvenile and Domestic Relations District (JDR) Court to register and enforce this order. The JDR court granted appellee's petition on January 14, 2009, without specifying a particular manner of enforcement, and appellant appealed to the circuit court. The circuit court "affirmed" the JDR court's order on March 16, 2009. Appellant then appealed the circuit court's March 16, 2009 order to this Court, and a panel of this Court heard oral argument from the parties on December 9, 2009.[3]

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[3] Appellee filed a motion on January 12, 2010, requesting that we permit her to supplement the record. Appellant filed a similar motion on January 26, 2010. However, neither party provided any legal authority to support these requests to supplement the record. Rule 5A:20(e) (requiring the parties to supply this Court with legal authority for their positions); see Woodfin v. Commonwealth, 236 Va. 89, 98, 372 S.E.2d 377, 382 (1988) (noting that generally appellate courts "are limited to the appellate record" and "are not permitted to supplement the record by referring to [other evidence] not made a part" of the original record); but see Rountree v. Rountree, 200 Va. 57, 62-64, 104 S.E.2d 42, 47-48 (1958) (noting that under certain circumstances, some "extrinsic evidence" can be

considered by an appellate court based on [footnote continued] the particular evidence and the particular issue involved). In addition, as an appellate court, this Court cannot act as the factfinder in this case and, as such, cannot properly be the factfinder with regard to the factual representations that appellant and appellee now want to incorporate into this record. See Woodfin, 236 Va. at 98, 372 S.E.2d at 382. For these reasons, and because the continual progression of other litigation between these parties, which is not now before this Court, could result in constant requests to supplement this record *ad infinitum*, we deny both parties' motions to supplement the record.

II. LEGAL BACKGROUND

In 2003 appellant filed a petition with a Vermont court,[4] asking, *inter alia*, for a determination of custody and visitation matters involving I.M.J., as between herself and appellee. The Vermont court subsequently entered an order that granted appellee some parental rights over I.M.J.

Appellant then filed a petition with the court in Frederick County, Virginia, asking that court to find that appellee had no parental rights in relation to I.M.J., in direct contradiction of the Vermont court's ruling. The trial court granted appellant's motion, and appellee appealed. A panel of this Court, after considering appellant's arguments regarding the applicability of two federal laws, the Parental Kidnapping Prevention Act (PKPA) and the Defense of Marriage Act (DOMA), and of the Virginia Marriage Affirmation Act (MAA), found that the Vermont court had jurisdiction over the case. Miller-Jenkins I, 49 Va. App. at 94-102, 637 S.E.2d at 333-37. This Court then "vacate[d] the orders of the trial court and remand[ed]

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[4] At the time appellant filed this petition, appellee lived in Vermont, where the parties had previously lived together, and appellant and I.M.J. lived in Virginia.

this matter to the trial court with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court." Id. at 103, 637 S.E.2d at 338. Appellant failed to perfect her appeal of this decision to the Supreme Court of Virginia because she failed to file a notice of appeal. Miller-Jenkins v. Miller-Jenkins, Record No. 070355 (Va. May 7, 2007).

After the conclusion of Miller-Jenkins I, appellee filed a motion with the Frederick County court asking for the registration of a Vermont order that granted appellee visitation with I.M.J. When this motion was granted, appellant appealed to this Court. This Court affirmed the trial court's decision, Miller-Jenkins v. Miller-Jenkins. Rec. No. 0688-06-4, 2007 Va. App. LEXIS 158 (Va. Ct. App. Apr. 17, 2007), and appellant this time properly perfected an appeal of that decision to the Supreme Court of Virgnia. Miller-Jenkins II, 276 Va. 19, 661 S.E.2d 822.

Although this subsequent appeal involved registration of an out-of-state order, rather than the jurisdiction of the Virginia courts over a petition to determine parental rights as was considered in Miller-Jenkins I, the Supreme Court found that, under the law of the case doctrine, the decision in

Miller-Jenkins I controlled its resolution of the subsequent appeal. The Supreme Court explained:

> Our decisions applying the "law of the case" doctrine generally have involved litigation that has proceeded in a "linear" sequence to trial, appeal, trial on remand, and second appeal, all under the same set of pleadings. See, e.g., Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92, 108, 524 S.E.2d 420, 429 (2000) (stating that issue decided in first case and not appealed was not subject to relitigation on remand); Kemp [v. Miller], 160 Va. [280,] 284, 168 S.E. [430,] 431 [(1933)] (holding that issues decided on appeal were binding law of case on remand). However, we have never limited the "law of the case" doctrine to litigation that occurs in such sequential fashion under one set of pleadings.
>
> In our decision in Kondaurov [v. Kerdasha, 271 Va. 646, 629 S.E.2d 181 (2006)], we explained that our application of the "law of the case" doctrine extends to "future stages of the same litigation." 271 Va. at 658, 629 S.E.2d at 188. Thus, when two cases involve identical parties and issues, and one case has been resolved finally on appeal, we will not re-examine the merits of issues necessarily involved in the first appeal, because those issues have been resolved as part of the "same litigation" and have become

the "law of the case."

276 Va. at 26-27, 661 S.E.2d at 826. "Thus, we conclude that the 'law of the case' doctrine prevents [appellant] from reasserting the issues she raises in the present appeal because each of those issues was decided finally by the first Virginia appeal, which [appellant] failed to perfect in this Court." Id. at 28, 661 S.E.2d at 827. In reaching this conclusion, the Supreme Court also explained:

> we first decline [appellant's] request that we consider the effect of the Virginia Marriage Amendment on the arguments presented in this appeal. [Appellant] did not ask the Court of Appeals to consider the Virginia Marriage Amendment, despite the fact that it became effective on January 1, 2007, several months before the Court of Appeals issued its opinion in the present appeal. In addition, [appellant] did not assign error in this Court to the Court of Appeals' failure to consider the Virginia Marriage Amendment. Therefore, we conclude that this part of [appellant]'s argument is procedurally barred.

Id. At 27, 661 S.E.2d at 826-27.

III. ANALYSIS[5]

Although appellant argues otherwise, we conclude that the law of the case doctrine clearly

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[5] After oral argument in this case, on December 18, 2009, the Court ordered the parties to brief the issue of mootness, based on information provided during the argument. After reviewing those briefs and the record in this case, we find that mootness does not prevent consideration of this appeal.

In her supplemental brief on mootness, appellee raised a new argument based on the fugitive disentitlement doctrine – an argument that she had failed to mention previously and which this Court's order had not given her leave to raise. In response, appellant filed a motion on January 26, 2010, requesting permission to file an additional supplement brief to address the fugitive disentitlement doctrine issue raised by appellee. We hereby grant appellant's motion, and we have reviewed and considered the additional supplemental brief that appellant filed.

We find that the fugitive disentitlement doctrine was not raised as an argument at trial, and, therefore, it was not preserved for appeal. Rule 5A:18. While the circumstances [footnote continued] upon which appellee bases her argument for application of this doctrine occurred while this appeal

was pending, appellee did not ask for leave from this Court to present argument in her supplemental brief that the fugitive disentitlement doctrine applies here. Furthermore, appellee's supplemental brief was filed pursuant to an order of this Court that requested briefing only on mootness. Therefore, we find appellee's argument on the fugitive disentitlement doctrine is not properly before this Court, and, thus, we decline appellee's invitation to address the fugitive disentitlement doctrine's application to the facts in this case.

controls the resolution of this appeal.[6]

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[6] The trial court addressed the substance of appellant's arguments, rather than applying the law of the case doctrine, even though appellee noted in her brief to that court that the law of the case doctrine applied here, pursuant to Miller-Jenkins II, and the trial court acknowledged that these issues had been resolved by previous appeals. Despite this approach by the trial court, we specifically base our ruling only on the law of the case doctrine, following the instructions of the Supreme Court in Miller-Jenkins II.

Appellant contends that this case differs from the previous line of cases because it involves registration *and* enforcement of a Vermont visitation order, not simply registration of an order as appellee requested in Miller-Jenkins II. However, this alleged distinction ignores the fact that the first case heard by this Court, Miller-Jenkins I, considered the question of whether the Virginia courts had jurisdiction to address the substance of appellant's petition for a determination of parental rights overall, given the PKPA and the Vermont court's entry of an order determining these rights as between these parties. Appellant's petition in Miller-Jenkins I essentially asked whether such an out-of-state court's order must be acknowledged and thereby enforced by the Virginia courts. 49 Va. App. at 92, 637 S.E.2d at 332. In fact, the petition that led to the decision in Miller-Jenkins I, which appellant herself filed with the Frederick County court to start the Virginia litigation between these parties, specifically asked the court to find that the parental rights afforded to appellee by the Vermont court were "'nugatory, void, illegal and/or *unenforceable*.'" Id. (emphasis added).

In addition, as the Supreme Court of Virginia held in Miller-Jenkins II, a subsequent appeal (such as the one here) need not involve the exact same line of litigation, as long as the parties and issues are identical to those in the previous case. 276 Va. at 26-27, 661 S.E.2d at 826. In this appeal, the same parties and issues are involved as those parties and

issues that were present in Miller-Jenkins I and Miller-Jenkins II. The Supreme Court in Miller-Jenkins II repeatedly stated that, although Miller-Jenkins I may well have quite limited applicability in cases involving other parties, it *is* the law of the case for custody and visitation matters between these parties. Id. at 26-28, 661 S.E.2d at 826-27; see also id. at 28-29, 661 S.E.2d at 827-28 (Hassell, C.J., concurring) (noting that although he did not agree with the decision in Miller-Jenkins I, appellant had "failed to perfect an appeal" and so the Supreme Court could not review that decision. Thus, "the law of the case doctrine prohibit[ed] this Court from considering the merits of the former appeal in this proceeding."). Appellant makes the same basic arguments on appeal here as she made in Miller-Jenkins I and Miller-Jenkins II. Even appellant's argument based on the Virginia Marriage Amendment was addressed previously when the Supreme Court of Virginia found that appellant had not preserved her right to make this argument in Miller-Jenkins II.[7] 276 Va. at 27, 661 S.E.2d at 826-827. Thus, all of the arguments raised by appellant have been raised by her in the previous incarnations of this case.

The Supreme Court very clearly stated in Miller-Jenkins II that the Virginia courts may not "reach the merits of the underlying issues" previously raised by appellant in related litigation in order to invalidate a Vermont custody and/or visitation order regarding I.M.J. because those issues were addressed

in Miller-Jenkins I. Id. at 28, 661 S.E.2d at 827. Therefore, as mandated by the Supreme Court in Miller-Jenkins II, we find that the law of the case doctrine applies in this appeal, and requires that we affirm the trial court's order to register and enforce the Vermont visitation order.

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[7] Similarly, appellant did not preserve her right to argue based on the PKPA, the DOMA, and the MAA in Miller-Jenkins II because she failed to properly note her appeal of Miller-Jenkins I to the Supreme Court of Virginia. Miller-Jenkins II, 276 Va. At 24, 661 S.E.2d at 825.

IV. CONCLUSION

For the above reasons, we find that the Supreme Court of Virginia has clearly directed that the doctrine of the law of the case, as between these parties and involving the issues raised again by appellant, requires that this affirm the trial Court's decision to require registration and enforcement of the November 7, 2008 Vermont order directing visitation with the child.

AFFIRMED

APPENDIX D

VIRGINIA:

IN THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT OF FREDERICK COUNTY

JANET JENKINS

Petitioner

v.

LISA MILLER

Respondent

DOCKET NO. JJ018902-01F

JA013947-02F

IN RE: ISABELLA MILLER-JENKINS, d.o.b. 4/16/02

ORDER

CAME THIS 6th day of January, 2009, the Petitioner, by her counsel, Rebecca K. Glenberg, Esq., and also came Respondent, in person and with her counsel, Stephen M. Crampton, Esq., appearing *pro hac vice*, and Sarah E. Seitz, Ese., to be heard upon the Petitioner's Motions to Register and Enforce the visitation order of the State of Vermont.

WHEREUPON, the Court heard argument and considered the briefs already filed. In consideration whereof, the Court makes the following findings and conclusions:

1. The immediate order sought to be registered is an order entered by the Family Court of Rutland, Vermont on November 7, 2008; this order addresses visitation of the child, Isabella Miller-Jenkins, and is therefore a "child custody determination" as defined by the UCCJEA (Va. Code §20-146.1) and a "visitation determination" as defined by the PKPA (20 U.S.C. §1738A);

2. The Request for Registration comports procedurally with the UCCJEA (Va. Code §20-146.26) in that there is a document requesting registration, two copies, one certified, of the determination to be registered, a statement under penalty of perjury that the order is not known to have been modified, and the name and address of the person seeking registration and of any parent or person acting as a parent who has been awarded custody or visitation. Janet Jenkins is the person seeking registration, and Lisa Miller is the parent who has been awarded custody of the child. Further the registering court did properly file the

papers, and serve notice to Lisa Miller, all as required by Va. Code §20-146.26, B., 1. and 2.

3. A prior order in the Vermont case between these parties, entered June 17, 2004, was registered in this Court, and such registration has been upheld after exhausting all appellate remedies in the Commonwealth. *Miller-Jenkins v. Miller Jenkins*, 276 Va. 19, 661 S.E.2d 822 (2008)

4. Neither registration nor enforcement of this order is barred by the Marriage Affirmation Act, Va. Code §20-45.3 or the Marriage Amendment, Va. Const. Art I, §15-A. The PKPA pre-empts state law and requires full and faith credit to Vermont's custody determination. Further, the argument that such credit would breach the public policy of the Commonwealth calls for the creation of an exception to these Acts that essentially guts one of their core purposes - to prevent cases from being litigated in different states in pursuit of different results. Many states have different approaches or views about certain considerations in custody cases, including same-sex relationships, out-of-wedlock relationships, and parent/non-parent relationships. The

view each state takes of such situations is based on its public policy. However, the Federal legislature recognized in the PKPA, and the state legislatures have recognized in the UCCJEA, that an overarching policy consideration is limiting parties from defeating duly made custody determinati ns by simply moving amongst the states. It is not a stretch to think that if Ms. Miller had commenced proceedings in Virginia first, that the Virginia court probably would not have granted any custodial or visitation rights to Ms. Jenkins. By the same standards as this Court applies in the present case, Ms. Jenkins could not then go to the Vermont Court and seek a different result, or seek to hide in Vermont without fear of recognition or enforcement of a duly entered Virginia order.

5. Registration and enforcement of this Order is not a recognition or condonation of the Vermont same-sex civil union; it is only a recognition that a Vermont court with jurisdiction over the contestants and the child made a custody or visitation determination. It does not matter to us what the relationship of the parties, or the reasons why the Vermont judge made

his decision. The essence of full and faith credit, and the policy behind the PKPA and UCCJEA, is that we do not look behind orders validly entered in another state to the basis of their decision.

6. The Uniform Enforcement of Foreign Judgments Act (Va. Code §8.01-465.1, et seq.) does not bar this action. Though this is a "foreign judgment" as referred to in this Act, Va. Code §8.01-465.5 provides that the Act does not impair the right to enforce foreign judgments by bringing an action other than under the Act. The UCCJEA accords a process for an action not brought under the Foreign Judgments Act, which is what has occurred here. Therefore, the provisions of the Act staying any proceedings pending an appeal in the original state do not apply here. Enforcement of the Vermont order would only be stayed pending the Vermont appeal, if Vermont law so provided, and counsel for Ms. Miller agrees that Vermont law did not stay the order pending appeal.

FOR THE FOREGOING REASONS, it is hereby ADJUDGED and ORDERED that the Order of the Family Court of Rutland, Vermont dated November 7, 2008 is registered in accord with

Virginia Code §20-146.26.

It is further ORDERED that Lisa Miller shall comply with the terms of said order, particularly by complying with the provisions for visitation on January 17 to 19, 2009 and March 7 to 14, 2009.

APPEAL: Lisa Miller, by counsel, has duly noted her appeal to the Court. The Clerk shall forward this case as an appealed matter to the Circuit Court of Frederick County, pursuant to the proper procedures.

The Clerk shall forward copies of this Order to counsel of record. There is good cause existing to dispense with the endorsement of counsel on this Order, pursuant to Rule 8:19 of the Rules of the Supreme Court of Virginia. Any party may file written objections to the form of the Order within ten (10) days of its entry.

ENTERED this 14th day of January, 2009.

s/William W. Sharp

WILLIAM W. SHARP,

JUDGE

APPENDIX E

PRESENT: All the Justices

LISA MILLER-JENKINS

v.

JANET MILLER-JENKINS

Record No. 070933

OPINION BY

JUSTICE BARBARA MILANO KEENAN

June 6, 2008

FROM THE COURT OF APPEALS OF VIRGINIA

In this appeal, we consider whether the Court of Appeals erred in directing a circuit court to register a custody and visitation order rendered by a Vermont court, based on the Court of Appeals' previous holding in the same custody and visitation dispute that the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2000 & Supp. V 2005), requires that the courts of this Commonwealth give full faith and credit to the Vermont order.

In 2000, Lisa Miller-Jenkins (Lisa) and Janet Miller-Jenkins (Janet) entered into a civil union (the civil union) in Vermont that was permitted under

Vermont law.[1] Lisa and Janet decided that Lisa would bear a child, and in April 2002, after successful artificial insemination, Lisa gave birth to IMJ[2] in Virginia. Lisa, Janet, and IMJ lived together in Virginia until July 2002, when they moved to Vermont, where they lived until September 2003. At that time, Lisa and IMJ returned permanently to Virginia over Janet's objection.

In November 2003, Lisa filed a petition in a Vermont family court (the Vermont court), seeking to dissolve the civil union and to gain custody of IMJ. The Vermont court dissolved the civil union and entered a custody and visitation order (the Vermont custody order) granting temporary custody of IMJ to Lisa and temporary visitation rights to Janet. After initially allowing Janet to visit IMJ in June, Lisa thereafter refused to permit Janet to have contact with IMJ as required by the terms of the Vermont custody order.

On July 1, 2004, Lisa filed a petition in the Frederick County Circuit Court (the circuit court), asking the circuit court to determine that Lisa was IMJ's "sole parent" and seeking sole custody of IMJ. On July 7, 2004, Janet filed a motion in the Vermont

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[1] Because the parties have the same last name, we will refer to them by their first names.

[2] Because IMJ is a minor, we refer to her by pseudonym.

court seeking enforcement of the Vermont custody order and a determination that Lisa was in contempt of that court for her failure to abide by the terms of the Vermont custody order. On July 19, 2004, the Vermont court entered an order holding that the Vermont court had continuing jurisdiction over all custody matters in the case, and that the Vermont court would not defer to an order entered by a court in another state purporting to resolve the issue of custody.

In August 2004, the circuit court entered an order temporarily awarding sole custody of IMJ to Lisa and ordered that IMJ not be removed from Virginia (the Virginia custody order). Because the Vermont custody order included a provision granting Janet scheduled visitation with IMJ in Vermont, the Virginia custody order was in direct conflict with the Vermont custody order. In September 2004, the Vermont court issued an order holding Lisa in contempt for violating the terms of the Vermont custody order.

In October 2004, the circuit court concluded that it had jurisdiction over the custody dispute and entered an order awarding sole custody to Lisa, holding that Janet did not have any parental rights, and that Lisa was IMJ's "sole" parent. In November 2004, the Vermont court issued a contrary order holding that Lisa and Janet were both "parents" of IMJ.

In January 2005, Janet appealed the Virginia

custody order to the Court of Appeals (the first Virginia appeal). See Miller-Jenkins v. Miller-Jenkins, 49 Va. App. 88, 637 S.E.2d 330 (2006). In November 2006, the Court of Appeals reversed the circuit court's judgment entering the Virginia custody order, holding that the circuit court did not have jurisdiction to enter the order because the dispute was a "custody and visitation determination" subject to the provisions of the Parental Kidnapping Prevention Act, 28 at 103, U.S.C. § 1738A (2000 & Supp. V 2005) (the PKPA), which accorded Vermont sole jurisdiction over the custody and visitation dispute. Id. At 103, 637 S.E.2d 337-38. The Court of Appeals concluded that the provisions of the Defense of Marriage Act, 28 U.S.C. § 1738C (2000 & Supp. V 2005) (the DOMA), did not alter the applicability of the PKPA to the custody and visitation dispute, and that the PKPA preempted all state law to the contrary, including Code § 20-45.3 Id. (the Marriage Affirmation Act). Id. at 102-03, 637 S.E.2d at 337.

The Court of Appeals further held in the first Virginia appeal that Vermont law governed the parties' dispute, and that the courts of Virginia were bound by Vermont's interpretation of its own law. Id. at 96-97, 637 S.E.2d at 334-35. Accordingly, based on its holding that Vermont had sole jurisdiction over the case, the Court of Appeals declined to address the issue whether the civil union would have been recognized under Virginia law. Id. at 103, 637 S.E.2d at 337-38.

Following the Court of Appeals' entry of

judgment in the first Virginia appeal, Lisa filed a petition for appeal to this Court. We dismissed Lisa's petition because she failed to file a notice of appeal. Miller-Jenkins v. Miller-Jenkins, Record No. 070355 (May 7, 2007).

Meanwhile, in March 2005, Janet sought to register the Vermont custody order in the Juvenile and Domestic Relations District Court of Frederick County (the juvenile and domestic relations court). The juvenile and domestic relations court registered the Vermont custody order, and Lisa appealed that decision to the circuit court. The circuit court reversed the juvenile and domestic relations court's judgment mandating registration of the Vermont custody order.

Janet appealed from the circuit court's judgment to the Court of Appeals. In an unpublished opinion, the Court of Appeals summarily reversed the circuit court's order and reinstated the registration of the Vermont custody order, holding that this result was mandated by the Court of Appeals' decision in the first Virginia appeal. Miller-Jenkins v. Miller-Jenkins, Record No. 0688-06-4 (April 17, 2007). Lisa appeals from the Court of Appeals' judgment.

Addressing the merits of her appeal, Lisa argues that the Court of Appeals erred in concluding that the PKPA requires that Virginia courts give full faith and credit to the Vermont custody order. Lisa maintains that the DOMA, not the PKPA, is applicable in determining whether Virginia must

accord full faith and credit to Vermont's child custody orders, and that the Court of Appeals erred in holding that the PKPA preempts the Marriage Affirmation Act and in not addressing whether the PKPA also preempts Article I, § 15-A of the Constitution of Virginia (the Virginia Marriage Amendment). Lisa also contends, among other things, that both the Court of Appeals' judgment and the Vermont judgment violated her fundamental parental rights.

Janet argues, however, that this Court should not reach the merits of Lisa's appeal. Janet contends that Lisa's claims are barred by the "law of the case" doctrine because all the issues presented in this appeal were resolved by the Court of Appeals' decision in the first Virginia appeal, which Lisa failed to timely appeal to this Court. Janet maintains that the first Virginia appeal and the present appeal are the same "case," because the present appeal involves the same parties and the same issue of custody and visitation. Thus, Janet asserts that under the "law of the case" doctrine, the Court of Appeals' holding in the first Virginia appeal that the PKPA requires Virginia to give full faith and credit to the Vermont custody order was a binding adjudication that resolves the issues before us in the present appeal.

In response, Lisa contends that the "law of the case" doctrine does not apply to the present appeal, because the present appeal is not the same "case" that was before the Court of Appeals in the first Virginia appeal. According to Lisa, the issue in the

first Virginia appeal was whether the courts of Virginia had jurisdiction to entertain Lisa's custody petition, while the issue in the present appeal is whether the courts of Virginia must give full faith and credit to the Vermont custody order. Lisa further maintains that the Court of Appeals could not have addressed in the first appeal whether the PKPA preempted the Virginia Marriage Amendment, because that amendment was not effective when the Court of Appeals rendered its decision in the first appeal. We disagree with Lisa's arguments. The "law of the case" doctrine is well established in the courts of this Commonwealth. Under this doctrine,

> [when] there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law.

Steinman v. Clinchfield Coal Corp., 121 Va. 611, 620, 93 S.E. 684, 687 (1917); see Uninsured Employer's Fund v. Thrush, 255 Va. 14, 18, 496 S.E.2d 57, 59 (1998); Chappell v. White, 184 Va. 810, 816, 36 S.E.2d 524, 526-27 (1946); Kemp v. Miller, 160 Va. 280, 284, 168 S.E. 430, 431 (1933).

Pursuant to the "law of the case" doctrine, when a party fails to challenge a decision rendered by

a court at one stage of litigation, that party is deemed to have waived her right to challenge that decision during later stages of the "same litigation." See Kondaurov v. Kerdasha, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006). The "law of the case" doctrine applies both to issues that were actually decided by the court, and also to issues "necessarily involved in the first appeal, whether actually adjudicated or not." Kemp, 160 Va. at 285, 168 S.E. at 431; Searles v. Gordon, 156 Va. 289, 296, 157 S.E. 759, 761 (1931); Norfolk & W.R. Co. v. Duke, 107 Va. 764, 766, 60 S.E. 96, 97 (1908).

Our decisions applying the "law of the case" doctrine generally have involved litigation that has proceeded in a "linear" sequence to trial, appeal, trial on remand, and second appeal, all under the same set of pleadings. See, e.g., Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92, 108, 524 S.E.2d 420, 429 (2000) (stating that issue decided in first case and not appealed was not subject to relitigation on remand); Kemp, 160 Va. at 284, 168 S.E. at 431 (holding that issues decided on appeal were binding law of case on remand). However, we have never limited the "law of the case" doctrine to litigation that occurs in such sequential fashion under one set of pleadings.

In our decision in Kondaurov, we explained that our application of the "law of the case" doctrine extends to "future stages of the same litigation." 271 Va. at 658, 629 S.E.2d at 188. Thus, when two cases involve identical parties and issues, and one case has

been resolved finally on appeal, we will not re-examine the merits of issues necessarily involved in the first appeal, because those issues have been resolved as part of the "same litigation" and have become the "law of the case."

Under the "law of the case" doctrine, courts assume without deciding that there may be error in the decision of the court below. See Chappell, 184 Va. at 816, 36 S.E.2d at 527; Kemp, 160 Va. at 284, 168 S.E. at 431; Peterson v. Haynes, 145 Va. 653, 660, 134 S.E. 675, 677 (1926); Steinman, 121 Va. at 622, 93 S.E. at 688. As a result, a decision that becomes the "law of the case" is adhered to only in the case in which it arose and does not become binding precedent in other cases. See Chappell, 184 Va. at 816, 36 S.E.2d at 527; Kemp, 160 Va. at 284, 168 S.E. at 431; Steinman, 121 Va. at 622, 93 S.E. at 688.

With these principles in mind, we first decline Lisa's request that we consider the effect of the Virginia Marriage Amendment on the arguments presented in this appeal. Lisa did not ask the Court of Appeals to consider the Virginia Marriage Amendment, despite the fact that it became effective on January 1, 2007, several months before the Court of Appeals issued its opinion in the present appeal. In addition, Lisa did not assign error in this Court to the Court of Appeals' failure to consider the Virginia Marriage Amendment. Therefore, we conclude that this part of Lisa's argument is procedurally barred. See Rule 5:17(c).

We also observe that Lisa's petition and brief filed in this Court contain the identical assignments of error that she presented in her petition to this Court in the first Virginia appeal. Because Lisa sought to appeal these same issues in the first Virginia appeal, we find no merit in her assertion that those issues were not before the Court of Appeals in the first Virginia appeal.

We have compared Lisa's arguments in the present appeal and the decision rendered by the Court of Appeals in the first Virginia appeal. We agree with the Court of Appeals' conclusion that each of the issues Lisa raises in this appeal was addressed and resolved in the first Virginia appeal. See Miller-Jenkins, 49 Va. App. 88, 637 S.E.2d 330 (2006); Miller-Jenkins v. Miller-Jenkins, Record No. 0688-06-4 (April 17, 2007).

The Court of Appeals' holding in the present appeal merely reflects the issues actually decided in the first Virginia appeal, including the issues whether the PKPA applied to the custody and visitation dispute and whether the Vermont custody order was entitled to full faith and credit. See Kemp, 160 Va. at 285, 168 S.E. at 431; Searles, 156 Va. at 296, 157 S.E. at 761; Norfolk & W.R. Co., 107 Va. at 766, 60 S.E. at 97. Thus, we conclude that the "law of the case" doctrine prevents Lisa from reasserting the issues she raises in the present appeal because each of those issues was decided finally by the first Virginia appeal, which Lisa failed to perfect in this Court. See Lockheed, 259 Va. at 108, 524 S.E.2d at

429; Searles, 156 Va. at 295-96, 157 S.E. at 761.

Our conclusion is not altered by Lisa's argument that the "law of the case" doctrine is inapplicable to the present appeal because this appeal is not the same "case" as the first Virginia appeal. Although Lisa and Janet separately filed the cases from which the two appeals arose, both cases involved these same parties and sought adjudication of the same issue, custody and visitation regarding IMJ. The two Virginia appeals were part of the "same litigation" seeking to resolve the single question which custody order, the Vermont custody order or the circuit court's order, would govern the parties' custody and visitation dispute. See Kondaurov, 271 Va. at 658, 629 S.E.2d at 188.

Finally, we observe that the Court of Appeals' holding in the first Virginia appeal is binding under the "law of the case" doctrine only with respect to the parties and the issues in the case before us. See Chappell, 184 Va. at 816, 36 S.E.2d at 527; Steinman, 121 Va. at 620, 93 S.E. at 687. Thus, based on our holding that the Court of Appeals' decision in the first Virginia appeal is the "law of the case," we do not reach the merits of the underlying issues presented in this appeal. See Chappell, 184 Va. at 816, 36 S.E.2d at 527; Kemp, 160 Va. at 284, 168 S.E. at 431; Peterson, 145 Va. at 660, 134 S.E. at 677; Steinman, 121 Va. at 622, 93 S.E. at 688.

For these reasons, we will affirm the Court of Appeals' judgment.

Affirmed.

CHIEF JUSTICE HASSELL, concurring.

I join the opinion of the Court. However, I write separately to state that I have serious concerns about the Court of Appeals' opinion in the former appeal, Miller-Jenkins v. Miller-Jenkins, 49 Va. App. 88, 637 S.E.2d 330 (2006). I do not believe that this decision was correctly decided. Lisa Miller-Jenkins failed to perfect an appeal from that decision in the manner required by law, see Miller-Jenkins v. Miller-Jenkins, Record No. 070355 (May 7, 2007), and, therefore, this Court could not review that decision. As the majority correctly holds, the law of the case doctrine prohibits this Court from considering the merits of the former appeal in this proceeding.

APPENDIX F

Westlaw.

Not Reported in S.E.2d, 2007 WL 1119817 (Va.App.)

(Cite as: Not Reported in S.E.2d)

Miller-Jenkins v. **Miller-Jenkins**

Va.App.,2007.

--- S.E.2d ----Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Virginia.Richmond.

Janet **MILLER-JENKINS**

v.

Lisa **MILLER-JENKINS**.

Record No. 0688-06-4.

April 17, 2007.

From the Circuit Court of Frederick County, John R. Prosser, Judge.

Rebecca K. Glenberg (Joseph R. Price; Arent Fox PLLC, on brief), for appellant.

Rena M. Lindevalsden (Mathew D. Staver; Liberty Counsel, on brief), for appellee.

Present: Judges FRANK, CLEMENTS and Senior Judge FITZPATRICK.

MEMORANDUM OPINION FN*

FN* Pursuant to Code § 17.1-413, this opinion is not designated for

publication.FITZPATRICK, Judge.

*1 In this appeal, Janet Miller-Jenkins challenges a March 1, 2006 order of the trial court. In that order, the trial court ruled that a Vermont order concerning child custody and visitation between the parties could not be registered in Virginia because (1) the Vermont order directly conflicted with the trial court's October 15, 2004 order adjudging Lisa Miller-Jenkins as the sole parent of IMJ, a child, (2) Vermont lacked subject-matter jurisdiction to enter its order, and (3) the Vermont order contravenes Virginia's public policy and statutory law.

In Record No. 2654-04-4, *Miller-Jenkins v. Miller-Jenkins*, 49 Va.App. 88, 637 S.E.2d 330 (2006), we vacated the trial court's October 15, 2004 order and remanded the case "to the trial court with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court." *Id.* at 103, 637 S.E.2d at 338.

In light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this

case, Record No. 0688-06-4. Accordingly, we likewise vacate the trial court's March 1, 2006 order and remand the case to the trial court with instruction to enter an order allowing Janet Miller-Jenkins to register the Vermont order in Virginia.

Vacated and remanded.

Va.App.,2007.

Miller-Jenkins v. Miller-Jenkins

Not Reported in S.E.2d, 2007 WL 1119817

(Va.App.)

END OF DOCUMENT

APPENDIX G

VIRGINIA: FREDERICK COUNTY CIRCUIT COURT

In Chancery Number: CH05-000336-00

on appeal from

JDR Case No. JJ018902-01-00

LISA MILLER-JENKINS,

Petitioner-Appellant,

v.

JANET MILLER-JENKINS,

Respondent-Appellee.

ORDER DECLINING

REGISTRATION OF VERMONT ORDER

THE request by Respondent to register in Virginia the June 17, 2004 Temporary Order re: Parental Rights and Responsibilities (the "Vermont Order") came before me on November 16, 2005. The Vermont Order granted Respondent parent-child contact with Isabella, who is Petitioner's biological child. By order dated October 15, 2004, this court

decreed that Petitioner is the sole biological and natural parent of Isabella, and that, as a result, neither "Respondent nor any other person has any claims of parentage or visitation rights over Isabella." By order dated August 8, 2005, the Juvenile and Domestic Relations District Court, Frederick County registered the Vermont Order over Petitioner's objections. Petitioner contends that the Vermont Order cannot be registered in Virginia for four reasons. First, Petitioner contends that the Vermont Order, which grants Respondent parent-child contact with Petitioner's biological child *directly conflicts* with this court's October 15, 2004. Second, Petitioner contends that registration by this court of the Vermont Order is prohibited by the Marriage Affirmation Act, VA. Code § 20-45.3. Registration of the Vermont Order, which grants Respondent parent-child contact is a right arising out of a civil union: Virginia treats civil unions as void in all respects. Third, Petitioner contends that the Vermont Order cannot be registered because the Vermont court lacked subject matter jurisdiction to issue the order. Fourth, Petitioner contends that registration and enforcement of the Vermont Order would infringe Petitioner's constitutional rights as the fit, biological parent over her child.

Respondent contends registration of the Vermont Order in Virginia does not conflict with this Court's October 15, 2004 order because Respondent asserts that she seeks to register the Vermont Order, but not to attempt to enforce it before the Virginia

Court of Appeals rules on the pending appeal of this court's October 15, 2004 order. Respondent also contends that the Marriage Affirmation Act does not prohibit registration of the Vermont Order because the Act does not apply to custody disputes. Finally, Respondent contends that the courts in Vermont, not Virginia, must determine whether the Vermont Order infringes Petitioner's substantive due process rights under the federal constitution. Having fully considered the arguments presented by Petitioner in her opening and reply briefs, and the arguments presented by Respondent in her responsive brief,

It is hereby ADJUDGED, ORDERED and DECREED that:

1. The Vermont Order cannot be registered in Virginia because it is in direct conflict with this Court's October 15, 2004 order, which adjudged, ordered, and decreed that Petitioner is the sole biological and natural parent of Isabella, and, therefore, Respondent had no standing to assert a claim of parentage or visitation over Isabella Miller-Jenkins.

2. The Vermont Order cannot be registered in Virginia because Vermont lacked subject matter jurisdiction to issue the June 7, 2004 Temporary Order re: Parental Rights and Responsibilities.

3. The Vermont Order cannot be registered in Virginia because it contravenes the public policy and direct statutory law of Virginia.

4. The August 8, 2005 order of the Juvenile and Domestic Relations District Court registering the Vermont Order is reversed.

This matter is hereby ended and to be removed from the court docket. The Clerk of the Circuit Court is directed to forward an attested copy of this Order to all counsel of record and to file these papers among those matters ended.

ENTERED this 1st day of March, 2006.

s/John R. Prosser

JUDGE

WE ASK FOR THIS:

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APPENDIX H

VIRGINIA:

IN THE JUVENILE AND DOMESTIC RELATIONS

DISTRICT COURT OF FREDERICK COUNTY

JANET MILLER-JENKINS,

Petitioner,

vs. Docket No. JJ018902-01F

LISA MILLER-JENKINS,

Respondent.

IN RE: ISABELLA MILLER-JENKINS, d.o.b 04/16/02

ORDER

CAME THIS 27TH day of July, 2005, the Petitioner, by her counsel, Joseph R. Price, Esq., and also came the Respondent, in person and with her counsel, Matthew D. Staver, Esq., appearing *pro hac vice*, to be heard upon the Respondent's objections to

the proposed registration of an out-of-state custody determination, pursuant to the Uniform Child Custody Jurisdiction And Enforcement Act (UCCJEA), Va. Code §§20-146.1, *et seq.*

WHEREUPON, the Court heard argument and considered the briefs already filed, the parties having previously agreed that the resolution of this matter was a question of law, with there being no material dispute as to the facts necessary to decide the question of law. In consideration whereof, the Court makes the following findings and conclusions:

1. The order sought to be registered is an order entered by the Family Court of Rutland, Vermont on June 17, 2004; this order provides in part for the legal and physical custody, and visitation of the child, Isabella Miller-Jenkins, and is therefore a "child custody determination" as defined by the UCCJEA (Va. Code §20-146.1).

2. The Request for Registration comports procedurally with the UCCJEA (Va. Code §20-146.26) in that there is a document requesting registration, two copies, one certified, of the determination to be registered, a statement under penalty of perjury that the order is not known to have been modified, and the name and address of the person seeking registration and of any parent or person acting as a parent who has been awarded custody or visitation. Janet Miller-Jenkins is the person seeking registration, and Lisa Miller-Jenkins is the parent who has been awarded custody of the child. Further the registering

court did properly file the papers, and serve notice to Lisa Miller-Jenkins, all as required by Va. Code §20-146.26,B., 1 and 2.

3. Pursuant to Va. Code §20-146.26, the Juvenile and Domestic Relations District Court has exclusive jurisdiction to register a foreign child custody determination. However, jurisdiction over the merits of custody and visitation of a child, which would include enforcement of a registered order, is concurrent with the Circuit Court (Va. Code §16.1-244) and when the Circuit Court assumes jurisdiction, the Juvenile and Domestic Relations District Court is divested of jurisdiction. *Peple v. Peple, 5 Va. App. 414, 364 SE2d 232 (1988).* The proceedings before the Circuit Court of Frederick County, Virginia, which resulted in the order of October 15, 2004, constitute an assumption of jurisdiction by the Circuit Court of the custody and visitation of Isabella. This Court has no jurisdiction to entertain any enforcement proceeding arising out of the Vermont order, unless and until jurisdiction over such issues is remanded to it by the Circuit Court.

4. An order registering the Vermont order is not in conflict with the Order of the Circuit Court of Frederick County because the Frederick County Circuit Court had no jurisdiction to address the question of registration. Indeed, that Court apparently specifically declined to rule on registration for that reason. An order granting registration is not a conclusion that the Vermont

order is enforceable in the Commonwealth of Virginia; such a conclusion would be beyond this Court's jurisdiction, as discussed in Section 3., *supra*.

5. Registration of this order is not barred by the Affirmation of Marriage Act. Such an argument requires an inquiry into the basis of the Vermont order that is beyond the registration process. A fundamental purpose of the UCCJEA is to prevent cases from being litigated in different states in pursuit of different results. Consequently, the process of registration looks at the facial validity of the order, and not results that might have obtained differently under the law of the state where it is to be registered. Further, registration of this Order is not a recognition or condonation of the Vermont same-sex civil union; it is only a recognition that a Vermont court with jurisdiction over the contestants and the child made a custody determination. While Lisa has argued that the Vermont court lacked subject matter jurisdiction under its own statutes – a matter Vermont must address, she has not argued that the Vermont court did not have *in personam* jurisdiction. Indeed, the order and the facts not in dispute establish that Lisa and Janet both appeared before the Vermont court, with counsel, and that Lisa invoked that Court's jurisdiction by filing the initial pleading asking for a determination of custody and visitation between her and Janet.

FOR THE FOREGOING REASONS, it is hereby ADJUDGED and ORDERED that the Order of the Family Court of Rutland, Vermont dated June

17, 2004 is registered in accord with Virginia Code §20-146.26. This Court will not entertain any proceedings to enforce the registered order unless and until it obtains jurisdiction of the custody and visitation of the child from the Circuit Court.

THIS IS A FINAL ORDER, AND EITHER PARTY HAS THE RIGHT TO APPEAL THIS ORDER, BY GIVING WRITTEN NOTICE OF THEIR APPEAL TO THE CLERK OF THIS COURT WITHIN TEN (10) DAYS OF THE DATE OF THIS ORDER.

The Clerk shall forward copies of this Order to counsel of record. There is good cause existing to dispense with the endorsement of counsel on this Order, pursuant to Rule 8:19 of the Rules of the Supreme Court of Virginia. Any party may file written objections to the form of the Order within ten (10) days of its entry.

ENTERED this 8th day of August, 2005.

/s/ William W. Sharp

WILLIAM W. SHARP, JUDGE

APPENDIX I

Court of Appeals of Virginia,

Alexandria.

*49 Va. App. 88, **637 S.E.2d 330

Janet MILLER-JENKINS

v.

Lisa MILLER-JENKINS

Record No. 2654-04-4.

Nov. 28, 2006.

Present: CLEMENTS, J., and WILLIS and ANNUNZIATA, S.J.

WILLIS, JR., Judge.

*91 Janet Miller-Jenkins ("Janet") appeals the October 15, 2004 "Final Order of Parentage" of the Circuit Court of Frederick County ("trial court"). In that order, the trial court held (1) that Lisa Miller-Jenkins ("Lisa") is "the sole biological and natural parent of" IMJ, a minor, (2) that Lisa "solely has the

legal rights, privileges, duties and obligations as parent hereby established for the health, safety, and welfare of" IMJ, and (3) that neither Janet "nor any other person has any claims of parentage or visitation rights over" IMJ.

On appeal, Janet contends the trial court erred (1) in failing to recognize that the federal Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. §§ 1738A, barred its exercise of jurisdiction, (2) in holding that the Virginia Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Code §§ 20-146.1 *et seq.*, permitted it to exercise jurisdiction, and (3) in refusing to enforce the June 17, 2004 custody order of the Rutland County, Vermont Family Court ("Vermont court").

We hold that the trial court erred in failing to recognize that the PKPA barred its exercise of jurisdiction. Accordingly, we vacate the orders of the trial court and remand this case with instruction to grant full faith and credit to the custody and visitation orders of the Vermont court.

I. BACKGROUND

Beginning in the late 1990's, the parties lived together in Virginia. On December 19, 2000, they traveled to Vermont *92 and entered into a civil union pursuant to the laws of that state. *See* Vt. Stat.

Ann. Tit. 15, §§ 1201 *et seq.* Thereafter, while residing in Virginia, Lisa was artificially inseminated with sperm from an anonymous donor. In April 2002, she gave birth to IMJ. In August 2002, the parties and IMJ moved to Vermont and established residence there. In September 2003, the parties ended their relationship. Lisa moved to Virginia with IMJ. Janet remained in Vermont.

On November 24, 2003, Lisa filed in the Vermont court a "Complaint for Civil Union Dissolution." She designated IMJ as "the biological or adoptive" child of the "civil union." She asked the Vermont court to dissolve the civil union, to award her legal and physical "rights and responsibilities for the minor child," to award Janet "suitable parent/child contact (supervised)," and to "award payment of suitable child support money."

On June 17, 2004, the Vermont court entered a "Temporary Order Re: Parental Rights & Responsibilities." In that order, the Vermont court awarded Lisa "temporary legal and physical responsibility for the minor child of the parties," and awarded Janet "on a temporary basis, parent-child contact with the minor child as follows...." The order then listed the specifics of that contact, and in so listing thrice used the word "visitation."

On July 1, 2004, the day Virginia's Marriage Affirmation Act ("MAA"), Code §§ 20-45.3 became

law, Lisa filed in the trial court a "Petition to Establish Parentage and for Declaratory Relief." She asserted that she had "sole custody" of IMJ, and asked the court (1) to declare that she was "the sole parent of" IMJ, (2) to rule that she was "to be the sole parent of and to have sole parental rights over" IMJ, (3) to adjudicate any parental rights claimed by Janet "to be nugatory, void, illegal and/or unenforceable," and (4) to award her attorney's fees and costs.

**333 On July 19, 2004, after learning of the petition filed by Lisa in Virginia, the Vermont court entered the following order:

> *93 This Vermont Court has and will continue to have jurisdiction over this case including all parent-child contact issues. This Court is unaware of any proceeding available in a state that does not recognize a civil union to resolve the issue of this case. This Court will not and cannot defer to a different State that would preclude the parties from a remedy.
>
> The Temporary Order for parent-child contact [is] to be followed. Failure of the custodial parent to allow contact will result in an immediate hearing on the need to change custody.

On July 29, 2004, Janet filed a demurrer to Lisa's

Virginia petition. On August 18, 2004, the trial court entered an order (1) recognizing that Janet was entering a special appearance for the purpose of contesting jurisdiction, (2) directing the parties to file memoranda addressing the question of jurisdiction, and (3) staying all visitation between Janet and IMJ except for supervised visitation in Virginia. Following an August 24, 2004 hearing, the trial court ruled it had jurisdiction pursuant to the MAA and the UCCJEA. It memorialized this ruling in a September 9, 2004 order. [FN1]

Meanwhile, the Vermont court, by order entered September 2, 2004, held Lisa in contempt for refusing to comply with the child visitation terms of its June 17, 2004 order.

On October 15, 2004, the trial court entered the final order in this case, setting forth the holdings delineated in the first paragraph of this opinion.

On appeal by Lisa, the Supreme Court of Vermont ("Vermont Supreme Court") affirmed the judgment of the Vermont court, holding, *inter alia*, that the civil union entered into by Lisa and Janet was valid under Vermont law; that the Vermont *94 court had jurisdiction to dissolve that civil union and to determine all its implications, including the parentage of and parental rights and responsibilities with respect to IMJ; and that the Vermont court acted properly in holding Janet to be a parent of IMJ and in assigning parental rights and responsibilities

to her. *Miller-Jenkins v. Miller-Jenkins*, --- A.2d ----, 2006 WL 2192715, 2006 Vt. LEXIS 159, at ---- 2-3, (Vt. Aug. 4, 2006). It held that PKPA afforded preemptive jurisdiction to Vermont and denied full faith and credit to Virginia orders contradicting those entered by the Vermont court. *Id.* at ----, 2006 WL 2192715, 2006 Vt. LEXIS 159, at ---- 13.

II. ANALYSIS

A. *The PKPA*

1. *Statutory History and Analysis*

28 U.S.C. §§ 1738A, commonly referred to as the Parental Kidnapping Prevention Act, carries the following title: "Full faith and credit given to child custody determinations." Subsection (a) of the PKPA reads: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State."

The United States Supreme Court has succinctly summarized the thrust of the PKPA:

> The Parental Kidnap[p]ing Prevention Act (PKPA or Act) imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act. In order for a state court's custody decree to be consistent with the provisions of the Act, the State must have jurisdiction under its own local law and one of five conditions set out in §§ 1738A(c)(2) must be met. Briefly put,

> these conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the State, if the *95 child has no home State and it would be in the child's best interest for the **334 State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused. Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, §§ 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

Thompson v. Thompson, 484 U.S. 174, 175-77, 108 S.Ct. 513, 514-15, 98 L.Ed.2d 512 (1988) (footnotes omitted).

The PKPA had its genesis in the confusion concerning the applicability of the full faith and credit doctrine, 28 U.S.C. §§ 1738, to child custody orders. *See Thompson*, 484 U.S. at 180, 108 S.Ct. at 516-17. Indeed, "a parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to relitigate the issue." *Id.* Yet, despite its unofficial and common title, the PKPA is not limited to parental kidnapping cases.

"[T]he principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations.... The sponsors and supporters of the Act continually indicated that the purpose of the PKPA was to provide for nationwide enforcement of custody orders made in accordance with the terms of the UCCJA [FN2].... *Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations....*"

Scott v. Rutherfoord, 30 Va.App. 176, 187, 516 S.E.2d 225, 231 (1999) (quoting *Thompson*, 484 U.S. at 181, 183, 108 S.Ct. at 517-518) (emphasis added). *See also Wilson v. Gouse*, 263 Ga. 887, 441 S.E.2d 57, 60 (1994) ("the PKPA was intended not only to apply where a child was abducted by a parent and removed to another state but to remedy what was widely *96 considered to be the inapplicability of the full faith and credit statute to child custody orders" (footnote omitted)).

[1] Moreover, it is well settled that the PKPA preempts any conflicting state law. *See Meade v. Meade*, 812 F.2d 1473, 1476 (4th Cir.1987) ("The PKPA quite simply preempts conflicting state court methods for ascertaining custody jurisdiction."). *See also Murphy v. Woerner*, 748 P.2d 749, 750 (Alaska 1988); *Delk v. Gonzalez*, 421 Mass. 525, 658 N.E.2d 681, 684 (1995); *In re Clausen*, 442 Mich. 648, 502 N.W.2d 649, 673-74 (1993); *In re Relationship of Henry*, 326 Or. 166, 951 P.2d 135, 138 (1997); *State ex rel. Conforti v. Wilson*, 203 W.Va. 21, 506 S.E.2d

58, 62 (1998); *Michalik v. Michalik*, 172 Wis.2d 640, 494 N.W.2d 391, 394 (1993).

[2] Pursuant to Vt. Stat. Ann. tit. 15, §§ 1206, [FN3] Lisa filed a "Complaint for Civil Union Dissolution" with the Vermont court on November 24, 2003. By doing so, she placed before the Vermont court the issues of the parties' legal and physical "rights and responsibilities" concerning IMJ and "suitable parent/child contact." In Vermont, the term "parental rights and responsibilities" means "the rights and responsibilities related to a child's physical living arrangements, parent child contact, education, medical and dental care, religion, travel and any other matter involving a child's welfare and upbringing." Vt. Stat. Ann. tit. 15, §§ 664(1). And the term "parent child contact" means "the right of a parent who does not have physical responsibility to have visitation with the child." Vt. Stat. Ann. tit. 15, §§ 664(2).

[3] In reviewing the applicability of the PKPA to the trial court's action, we are guided by the wording of the statute. "A principal rule of statutory interpretation is that courts will give statutory language its plain meaning." *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005). At its threshold, the PKPA requires that a court making a child custody or visitation determination have "jurisdiction *97 under the law of such State." 28 U.S.C. §§ 1738A(c)(1). The Vermont Supreme Court held that the Vermont court had jurisdiction

under the **335 laws of Vermont over the case initiated by Lisa's complaint. *See* Vt. Stat. Ann. tit. 15, §§ 1206. We are bound by that holding. *See* 28 U.S.C. §§ 1738A(a) and (g).

Furthermore, Code §§ 28 U.S.C. 1738A(c)(2)(A)(ii) sanctions the Vermont court's exercise of jurisdiction. That subsection applies where a state "had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State." *Id.* The parties lived together in Vermont until September 2003, when Lisa and IMJ moved to Virginia. Janet continued to live in Vermont. Lisa commenced the Vermont proceeding to dissolve the civil union in November 2003, two months after Vermont ceased to be IMJ's "home state, due to her having been removed from that state" by Lisa.

Because the Vermont court acquired jurisdiction over the issues of custody and visitation, subsections (g) and (h) of the PKPA governed the trial court's ability to entertain Lisa's petition. Those subsections read:

A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

28 U.S.C. §§ 1738A(g) and (h).

The proceeding in the Vermont court was pending when Lisa filed her petition in the trial court. The Vermont court was then exercising its jurisdiction under Vermont law and *98 consistently with the provisions of the PKPA. Thus, subsection (g) applied. The Vermont court, by virtue of its June 17, 2004 and July 19, 2004 orders, continued to exercise jurisdiction, giving application to subsection (h). Therefore, under a "plain meaning" statutory analysis, the trial court lacked authority to exercise jurisdiction based upon Lisa's custody and visitation action in Virginia or to modify the custody and visitation orders of the Vermont court.

2. Lisa's Position

Lisa posits three arguments why the PKPA did not preclude the trial court from exercising jurisdiction over her petition.

a. Application of Vermont Law

First, Lisa argues that "to the extent the Vermont

order constitutes a visitation determination, the Virginia court properly exercised jurisdiction because the Vermont order was not properly made." Specifically, Lisa contends the Vermont court could not grant "parent child contact" to Janet because it did not first determine that Janet was a parent. The Vermont Supreme Court rejected this argument. *Miller-Jenkins*, --- A.2d at ----, 2006 WL 2192715, 2006 Vt. LEXIS 159, at ---- 55. Furthermore, Lisa makes this contention despite the fact that she alleged in her "Complaint for Civil Union Dissolution" that IMJ was "the biological or adoptive child[ ] of said civil union," and despite the fact that the Vermont court in its June 17, 2004 order specifically found that IMJ was "the minor child of the parties."

Lisa cites no authority, and we know of none, that permits us to rule that the supreme court of another state incorrectly interpreted its own law. The contrary is well established: "This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Court of the State have given to those laws." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159, 6 L.Ed. 289 (1825).

*99 b. Custody or Visitation Determination

[4] Second, Lisa argues: "Even if the Vermont court properly made an initial custody determination

within the meaning of the PKPA, the Virginia court properly exercised jurisdiction over the parentage action filed in Virginia." Specifically, Lisa contends the **336 Virginia parentage action is not a custody or visitation determination per the PKPA. Yet, Lisa's petition to the trial court prays that she be adjudicated as having "sole parental rights" over IMJ and that Janet's claim to "parental rights" be adjudged "nugatory, void, illegal and/or unenforceable." Lisa's complaint in the Vermont court asserted that IMJ was "the biological or adoptive" child of the civil union. She asked that court to award Janet "suitable parent/child contact" and to "award payment of suitable child support money." She thus submitted the determination of IMJ's parentage to the jurisdiction of the Vermont court. Its resolution of that issue has been affirmed by the Vermont Supreme Court and is final.

Whatever semantical machinations are involved, any common understanding of the term "parental rights" includes the right to custody, *see Szemler v. Clements*, 214 Va. 639, 643, 202 S.E.2d 880, 884 (1974) ("Parental rights of custody are founded upon the strong presumption that the best interests of the child will be served by placing it in the custody of its natural parents."), and visitation, *see* Peter N. Swisher, Lawrence D. Diehl & James R. Cottrell, *Virginia Practice Series: Family Law: Theory, Practice, and Forms* §§ 15.8 (2004 ed.) ("The right of a non-custodial parent to the company and society of his or her child is well established. Barring gross

unfitness which jeopardizes the well being of the child, visitation is a presumed entitlement."). *See also L.A.M. v. State*, 547 P.2d 827 (Alaska 1976). [FN4] We therefore reject the contention *100 that Lisa's "parentage action" is not a custody or visitation determination embraced by the PKPA.

c. DOMA and the MAA

Third, Lisa argues: "Even if the Vermont court properly made an initial custody determination within the meaning of the PKPA, and the Virginia order is somehow construed as a visitation or custody determination, the Virginia court properly exercised jurisdiction over the matter by virtue of the federal Defense of Marriage Act and the [Virginia] Marriage Affirmation Act."

DOMA reads:

> No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or right or claim arising from such relationship.

28 U.S.C. §§ 1738C.

[5] Lisa argues that DOMA, enacted in 1996, effectively trumps the PKPA, enacted in 1980, thus enabling the trial court to exercise jurisdiction over Lisa's petition. We disagree.

[6] [7] Lisa cites no authority holding that either the plain wording of DOMA or its legislative history was intended to *101 affect or partially repeal the PKPA. Therefore, any Congressional intent to repeal must be by implication. However, "[r]epeal by implication is not favored and the firmly established principle of law is that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each." *Scott v. Lichford*, 164 Va. 419, 422, 180 S.E. 393, 394 (1935).

**337 [8] [9] We do not read the two statutes to conflict. They can be reconciled. In analyzing the statutes, we are mindful that "[t]he primary objective of statutory construction is to ascertain and give effect to legislative intent. *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction. *Id.*" *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998). As we have noted, " 'Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations.' " *Scott*, 30

Va.App. at 187, 516 S.E.2d at 231 (quoting *Thompson*, 484 U.S. at 183, 108 S.Ct. at 518). DOMA has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

H.R.Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906. *See also id.* at 18, *reprinted in* 1996 U.S.C.C.A.N. at 2922 ("It is surely a legitimate purpose of government to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage. [DOMA] advances this most important government interest.").

*102 Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations. Simply put, DOMA allows a state to deny recognition to same-sex marriage entered into in another state. This case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont. Rather, the only question before us is whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont court regarding IMJ's

custody and visitation. It cannot. The law of Vermont granted the Vermont court jurisdiction to render those decisions. By filing her complaint in Vermont, Lisa invoked the jurisdiction of the Vermont court. She placed herself and the child before that court and laid before it the assertions and prayers that formed the bases of its orders. By operation of the PKPA, her choice of forum precluded the courts of this Commonwealth from entertaining countervailing assertions and prayers. Lisa argues that the MAA forbade the trial court to extend full faith and credit to the orders of the Vermont court. The MAA reads:

> A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Code §§ 20-45.3.

We need not, and do not, decide whether the MAA applies to this case. If it does, it is preempted by the PKPA. *See, e.g., Meade,* 812 F.2d at 1476 (PKPA preempts conflicting state law).

B. *The UCCJEA*

Janet also contends the trial court erred in holding that the UCCJEA permitted it to exercise jurisdiction in this case. *103 Having determined that the PKPA is the controlling law in this matter and that the PKPA preempts conflicting state law, we need not address that issue.

III. CONCLUSION

We hold that the trial court erred in failing to recognize that the PKPA prevented its exercise of jurisdiction and required it to give full faith and credit to the custody and visitation orders of the Vermont court. By so holding, we do not address whether Virginia law recognizes or endorses same-sex unions entered into in another state or jurisdiction. We do not comment on the constitutionality, **338 viability or breadth of--the UCCJEA and the MAA. We do not consider the merits of the rulings of the Vermont court. Those questions are not before us. The issue before us is the narrow one of jurisdiction. By filing her complaint in Vermont, Lisa invoked the jurisdiction of the courts of Vermont and subjected herself and the child to that jurisdiction. The PKPA forbids her prosecution of this action in the courts of this Commonwealth. Accordingly, we vacate the orders of the trial court and remand this matter to the trial court with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court.

Vacated and remanded.

Va.App.,2006.
Miller-Jenkins v. Miller-Jenkins
49 Va.App. 88, 637 S.E.2d 330

FN1. The trial court, in the September 9, 2004 order, also certified the matter for an interlocutory appeal to this Court pursuant to Code §§ 8.01-670.1. Janet noted an appeal. Record No. 2192-04-4. By order entered January 6, 2005, we dismissed that appeal, finding that we lacked jurisdiction pursuant to either Code §§ 8.01-670.1 or Code §§ 17.1-405.

FN2. The Uniform Child Custody Jurisdiction Act, since superceded by the UCCJEA.

FN3. "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions."

FN4. While there is much discussion of parental rights in reported cases, few cases attempt to define those rights making discussion difficult. A careful review of the literature, including case law, treatise and law review, indicates that the following have been listed as "parental rights" protected to varying degrees by the Constitution:

> (1) Physical possession of the child which, in the case of a custodial parent includes the day-to-day care and companionship of the child. In the case of a non-custodial parent, possession is tantamount to the right to visitation.

(2) The right to discipline the child, which includes the right to inculcate in the child the parent's moral and ethical standards.

(3) The right to control and manage a minor child's earnings.

(4) The right to control and manage a minor child's property.

(5) The right to be supported by an adult child.

(6) The right to have the child bear the parent's name.

(7) The right to prevent an adoption of the child without the parents' consent.

L.A.M., 547 P.2d at 832 n. 13.

APPENDIX J

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

Chancery No. CH04-280

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

Entered September 9, 2004.

ORDER AND CERTIFICATION

FOR INTERLOCUTORY APPEAL

CAME THIS DAY the parties, by counsel, and were heard upon Respondent, Janet Miller-Jenkins' Demurrer to jurisdiction. Respondent contends that the exercise of jurisdiction in this Court regarding the determination of parentage and child custody and visitation is precluded by both the Parental

Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A, and Virginia's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1 *et seq.*, because the Rutland County Family Court in Vermont already has exclusive and continuing jurisdiction of this matter based on legal proceeding underway in that court involving the dissolution of the parties' civil union.

It is hereby ADJUDGED, ORDERED and DECREED that:

1. This Court can properly exercise jurisdiction in this matter regarding the determination of parentage and parental rights, including custody and visitation;

2. Based on the record before this Court, Petitioner is the biological parent of the minor child, Isabella Miller-Jenkins;

3. Virginia's UCCJEA does not preclude the exercise of jurisdiction because the jurisdiction of this Court is not substantially similar to the jurisdiction of the Vermont Court. Virginia's "Marriage Affirmation Act," Va. Code § 20-45.3, expressly provides that "[a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia

and any contractual rights created thereby shall be void and unenforceable." Any claim of parentage by Respondent under Vermont law is necessarily based on Respondent's civil union with Petitioner. For the UCCJEA to preclude the exercise of jurisdiction by this Court, Respondent must be a "person acting as a parent," which the UCCJEA defines as any person other than a parent who "claims a right to legal custody under the laws of this Commonwealth." Va. Code § 20-146.1. Here, Respondent cannot claim a right to legal custody under the laws of this Commonwealth as her claims are based on rights under Vermont's civil union laws that are null and void under Va. Code § 20-45.3;

4. Respondent has objected and excepted to this Court's finding that jurisdiction is proper and has requested certification for interlocutory appeal. This Court holds this matter is appropriate for interlocutory appeal pursuant to Va. Code § 8.01-670.1. It is hereby certified that this Court's holding that neither the PKPA, 28 U.S.C.A. § 1738A, nor the UCCJEA, Va. Code Ann. § 20-146.1 *et seq.*, precludes the exercise of jurisdiction by this Court in this matter, involves a question of law as to which there is substantial ground for difference of opinion, there is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, determination of whether jurisdiction can be properly exercised by this Court will be dispositive of this matter, and this Court and the parties agree it is in the parties' best

interest to seek interlocutory appeal;

5. This Court's temporary order of August 18, 2004, pertaining to custody of the minor child Isabella Miller-Jenkins shall remain in effect until modified by this Court; and

6. This matter shall be continued until Thursday, September 9, 2004, to set a trial date.

ENTERED this 9 day of September 2004.

s/John R. Prosser
Hon. John R. Prosser, Judge

Frederick County Circuit Court

SEEN & AGREED TO:

s/Phillip S. Griffin

Phillip S. Griffin II, Esq.

(VSB # 34576)

Peter Thos. Hansen, Esq.

(VSB # 34819)

Phillip S. Griffin II, P.C.

102 South Kent Street

Winchester, VA 22601

Counsel for Petitioner

s/Joseph R. Price

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Counsel for Respondent Janet Miller-Jenkins

APPENDIX K

VIRGINIA:

IN THE FREDERICK COUNTY CIRCUIT COURT

IN CHANCERY NUMBER: CH04-280

LISA MILLER-JENKINS,

Petitioner,

vs.

JANET MILLER-JENKINS,

Respondent.

FINAL ORDER OF PARENTAGE

THE suit to establish parentage pursuant to VA Code § 20-49.1 et seq., came before the Court on September 28, 2004 for trial. Phillip S. Griffin, II, Esquire and Peter Thos. Hansen, Esquire appeared for the Petitioner, Lisa Miller-Jenkins. The Respondent, Janet Miller-Jenkins, though she was served notice of the proceedings in person and through her counsel, Joseph R. Price, Esquire, did not appear in person or through her counsel.

THEREUPON, the Court heard argument and took evidence which established that Lisa Miller-Jenkins is the sole parent and biological mother of the minor child, Isabella Miller-Jenkins who was conceived by in vitro fertilization in Virginia, born in Virginia, and has resided in Virginia for more than six (6) months prior to the date of filing of the Petition for Parentage; that Janet Miller-Jenkins is not a parent of said minor child; and that the health, safety, and welfare of said minor child will best be protected by her biological mother, Lisa Miller-Jenkins, and not by Janet Miller-Jenkins.

UPON CONSIDERATION WHEREOF, it is hereby ADJUDGED, ORDERED, and DECREED that:

1. Petitioner is the sole biological and natural parent of Isabella Miller-Jenkins;

2. Petitioner solely has the legal rights, privileges, duties and obligations as parent hereby established for the health, safety, and welfare of the minor child, Isabella Miller-Jenkins.

3. Neither Respondent nor any other person has any claims of parentage or visitation rights over Isabella Miller-Jenkins.

This matter is hereby ended and to be removed from the court docket. The Clerk of the Circuit Court is directed to forward an attested copy of this Order to all counsel of record and to file these papers among

those matters ended.

ENTERED this 15th day of October 2004.

s/John R. Prosser

JUDGE

WE ASK FOR THIS:

s/Peter Thos. Hansen

Phillip S. Griffin II, Esquire

(VSB # 34576)

Peter Thos. Hansen, Esquire

(VSB # 34819)

Phillip S. Griffin II, P.C.

102 South Kent Street

Winchester, VA 22601

Counsel for Petitioner

APPENDIX L

SUPREME COURT OF VERMONT

Lisa MILLER-JENKINS

v.

Janet MILLER-JENKINS.

Nos. 04-443, 05-030.

Aug. 4, 2006.

Motion for Reargument Denied Nov. 9, 2006.

Present: REIBER, C.J., and DOOLEY, JOHNSON, SKOGLUND and BURGESS, JJ.

DOOLEY, J.

¶ 1. Lisa Miller-Jenkins appeals a family court decision finding her expartner, Janet Miller-Jenkins, to be a parent of their three-year-old child conceived via artificial insemination. On appeal, Lisa [FN1] contests three family court decisions. First, she appeals the decision by the Vermont family court that found both her and Janet to be legal parents of their child [hereinafter IMJ], and awarded Lisa temporary legal and physical rights and responsibilities of the child and Janet temporary parent-child contact. Second, Lisa appeals the family court's refusal to give full faith and credit to a Virginia court order, issued after the Vermont court's

temporary custody and visitation order, that was contrary to the Vermont decree and that precluded Janet's visitation rights. Finally, Lisa appeals an order of contempt issued by the family court based on her failure to abide by the temporary visitation order.

¶ 2. We granted interlocutory appeal to address the validity of these orders. We conclude the civil union between Lisa and Janet was valid and the family court had jurisdiction to dissolve the union. Further, we decide that the family court had exclusive jurisdiction to issue the temporary custody and visitation order under both the Uniform Child Custody Jurisdiction Act (UCCJA), 15 V.S.A. §§ 1031-1051, and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000). We affirm the family court's determination that Janet is a parent of IMJ, the resulting visitation order, and the order of contempt issued against Lisa for her failure to abide by the visitation order.

¶ 3. Lisa and Janet lived together in Virginia for several years in the late 1990's. In December 2000, the parties traveled to Vermont and entered into a civil union. In 2001, while Lisa and Janet were still a couple, Lisa began to receive artificial insemination from sperm provided by an anonymous donor. Janet participated in the decision that Lisa become impregnated and helped select the anonymous donor. In April 2002, Lisa gave birth to IMJ, with Janet present in the delivery room. Lisa, Janet, and IMJ lived in Virginia until IMJ was approximately four months old and then moved together to Vermont

around August of 2002. The parties lived together with IMJ in Vermont until the fall of 2003, when they decided to separate. After the separation, in September 2003, Lisa moved to Virginia with IMJ.

¶ 4. On November 24, 2003, Lisa filed a petition to dissolve the civil union in the Vermont family court in Rutland. In her complaint, Lisa listed IMJ as the "biological or adoptive child[ ]of the civil union." Lisa requested that the court award her custodial rights and award Janet parent-child contact. The family court issued a temporary order on parental rights and responsibilities on June 17, 2004. This order awarded Lisa temporary legal and physical responsibility for IMJ, and awarded Janet parent-child contact for two weekends in June, one weekend in July, and the third full week of each month, beginning in August 2004. The family court also ordered Lisa to permit Janet to have telephone contact with IMJ once daily.

¶ 5. Although Lisa permitted the first court ordered parent-child-contact weekend, she did not allow Janet to have parent-child contact after that date, nor did she allow Janet to have telephone contact with IMJ, as the family court had ordered. In fact, Lisa has not allowed Janet to have any contact with IMJ other than during that first weekend. Meanwhile, on July 1, 2004, after the Vermont court had already filed its temporary custody and visitation order and parentage decision, Lisa filed a petition in the Frederick County Virginia Circuit Court and asked that court to establish IMJ's parentage.

¶ 6. In response, on July 19, 2004, the Vermont court reaffirmed its "jurisdiction over this case including all parent-child contact issues," stated that it would not "defer to a different State that would preclude the parties from a remedy," and made clear that the temporary order for parent-child contact was to be followed. It added that "[f]ailure of the custodial parent to allow contact will result in an immediate hearing on the need to change custody."

¶ 7. Although the Vermont and Virginia courts consulted by telephone, an interstate parental rights contest ensued. On September 2, 2004, the Vermont court found Lisa in contempt for willful refusal to comply with the temporary visitation order. On September 9, the Virginia court held it had jurisdiction to determine the parentage and parental rights of IMJ and that any claims of Janet to parental status were "based on rights under Vermont's civil union laws that are null and void under Va.Code § 20-45.3." On October 15, the Virginia court followed with a parentage order finding Lisa to be the "sole biological and natural parent" of IMJ and holding that Janet has no "claims of parentage or visitation rights over" IMJ. That order is on appeal to the Virginia Court of Appeals.

¶ 8. On November 17, 2004, the Vermont court found that both Lisa and Janet had parental interests in IMJ and set the case for a final hearing on parental rights, property, and child support. Thereafter, on December 21, 2004, the Vermont court issued a ruling refusing to give full faith and credit to the

Virginia parentage decision. Lisa appealed both of these decisions, as well as the decision finding her in contempt.

I. Interstate Jurisdiction and Full Faith and Credit

¶ 9. This case is, at base, an interstate jurisdictional dispute over visitation with a child. Lisa argues here that the Vermont family court should have given full faith and credit to the Virginia court's custody and parentage decision, which determined Janet had no parentage or visitation rights with respect to IMJ. The family court rejected this argument because it concluded the Virginia decision did not comport with the PKPA, "which was designed for the very purpose of eliminating jurisdictional battles between states with conflicting jurisdictional provisions in child custody disputes." The Vermont court determined it had exercised jurisdiction consistent with the requirements of the PKPA and had continuing jurisdiction at the time Lisa's action was filed in Virginia. Therefore, it further concluded the Virginia court was prohibited from exercising jurisdiction by the PKPA, § 1738A(g), and the Vermont court had no obligation to give full faith and credit to the conflicting Virginia decision.

¶ 10. In analyzing Lisa's arguments, we note that she does not contest that if she and Janet were a validly married heterosexual couple, the family court's PKPA analysis would be correct. Because of her tacit acceptance of the family court's analysis with regard to jurisdiction under the PKPA, we provide only a

summary description of why we believe that the family court was correct.

¶ 11. The purpose of the PKPA is to determine when one state must give full faith and credit to a child custody determination of another state, such that the new state cannot thereafter act inconsistently with the original custody determination. Thompson v. Thompson, 484 U.S. 174, 181, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988). The PKPA follows on, and includes many of the provisions of, the Uniform Child Custody Jurisdiction Act (UCCJA), adopted in Vermont as 15 V.S.A. §§ 1031-1051. These acts were adopted to respond to "a growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states." National Conference of Commissioners on Uniform State Laws, Uniform Child Custody Jurisdiction Act, Prefatory Note (1968). The PKPA embodies preferences "to leave jurisdiction in the state which rendered the original decree[,] ... to promote the best interests of the child[,] ... [and to] discourage[ ] interstate abduction and other unilateral removals of children for the purpose of obtaining a favorable custody decree." Michalik v. Michalik, 172 Wis.2d 640, 494 N.W.2d 391, 398 (1993).

¶ 12. The PKPA applies equally to a visitation determination, requiring states to enforce "any custody determination or visitation determination made consistently with the provisions of this section

by a court of another State." 28 U.S.C. § 1738A(a). Because the first custody and visitation determination with respect to IMJ was made by the Vermont court, we must first examine whether that court exercised jurisdiction "consistently with the provisions of" the PKPA. Id. If it did, and if it continued to have jurisdiction when Lisa filed her proceeding in the Virginia court, the Virginia court was without jurisdiction to modify the Vermont order. Id. § 1738A(g), (h).

¶ 13. In order for a Vermont court to exercise jurisdiction consistent with the PKPA, it must have jurisdiction under Vermont law, id. § 1738A(c)(1), and meet one of four conditions, id. § 1738A(c)(2)(A)-(D). In this case, it met the condition in subsection (A)(c)(2)(A)(ii) that Vermont "had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State." Id. § 1738A(c)(2)(A)(ii). For purposes of this provision, "home State" is defined to mean "the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months." Id. § 1738A(b)(4). Because Vermont had been IMJ's home state within six months before Lisa filed her dissolution petition in November 2003, Lisa had removed IMJ from Vermont, and Janet lived in Vermont on the date the dissolution proceeding was

commenced, the requirements of subsection (A)(ii) were met. See Matthews v. Riley, 162 Vt. 401, 406, 649 A.2d 231, 236 (1994).

¶ 14. The PKPA also requires that the court have jurisdiction under Vermont law. Whether local jurisdiction is present is determined by the UCCJA. 15 V.S.A. § 1032(a); Matthews, 162 Vt. at 406, 649 A.2d at 235. For the exact reason that the Vermont proceeding met the PKPA condition discussed above, supra, ¶ 13, it met the identically-worded provision of the UCCJA. Compare 15 V.S.A. § 1032(a)(1)(B) with 28 U.S.C. § 1738A(c)(2)(A)(ii). Thus, the family court had jurisdiction under Vermont law as required by 28 U.S.C. § 1738A(c)(1).

¶ 15. Because the Vermont dissolution proceeding was still pending in July 2004, when Lisa filed her action in the Virginia court, and the Vermont proceeding was consistent with the PKPA, the Virginia court lacked jurisdiction pursuant to § 1738A(g) of the PKPA. That section specified that the court could not exercise jurisdiction over a proceeding to determine the custody of, or visitation with, IMJ while the Vermont proceeding was pending. The Virginia court violated this section by exercising jurisdiction over the case filed by Lisa.

¶ 16. Because the Vermont court had issued a temporary custody and visitation order, the Virginia court was also governed by § 1738A(h) of the PKPA. That section prohibited the Virginia court from modifying the Vermont court's order unless the

Vermont court "no longer [had] jurisdiction to modify such determination" or had "declined to exercise jurisdiction to modify such determination." Since the Vermont court continued to exercise jurisdiction over the Vermont proceeding, the Virginia court could have modified the order only if the Vermont court had lost its initial jurisdiction. Under the PKPA, a court that had initial jurisdiction to issue a custody or visitation order continues to have jurisdiction as long as it continues to have jurisdiction under state law and one of the contestants remains a resident of the state. Id. § 1738A(d); Matthews, 162 Vt. at 407, 649 A.2d at 236. The latter requirement is met because Janet continues to reside in Vermont.

¶ 17. Again, the former requirement of continuing jurisdiction is met if it is authorized by the UCCJA. See Matthews, 162 Vt. at 407, 649 A.2d at 236-37. At the time the Virginia court acted, the Vermont court had jurisdiction to modify its own visitation order if:

> (2) it is in the best interest of the child that a court of this state assume jurisdiction because:
>
> (A) the child and his parents, or the child and at least one contestant, have a significant connection with this state; and
>
> (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal

relationships.

15 V.S.A. § 1032(a)(2). These provisions were met because IMJ had recently resided in Vermont and the evidence of IMJ's relationship with Janet was present in Vermont. Matthews, 162 Vt. at 412, 649 A.2d at 239.

¶ 18. The Vermont court had continuing jurisdiction over the matter of Janet's visitation with IMJ. Therefore, the Virginia order extinguishing Janet's visitation right was issued in violation of § 1738A(h) of the PKPA. The Vermont court was not required to give full faith and credit to the Virginia order issued in violation of the PKPA. Matthews, 162 Vt. at 412-13, 649 A.2d at 240.

¶ 19. Lisa makes three arguments against applying this analysis in this case. First, she argues that the Virginia proceeding is a parentage action, and the PKPA does not apply to parentage actions. Even if we were to accept this argument, we do not understand how it would determine the question before us--that is, whether the Vermont court must give full faith and credit to the Virginia parentage decision. Apparently, Lisa's logic is as follows: Although the Vermont court determined that Janet is a parent of IMJ, the Virginia court could and did determine that Janet is not a parent of IMJ; the Vermont court must now accept the Virginia determination and strike any visitation order based upon the Vermont parentage determination. Whether Virginia must enforce the Vermont visitation order is not directly involved in

this appeal, but that is an entirely different question from whether full faith and credit requires the Vermont court to strike its own visitation order because the Virginia court refuses to recognize its validity based entirely on Virginia law. In Medveskas v. Karparis, 161 Vt. 387, 395, 640 A.2d 543, 546-47 (1994), we held that we would not extend full faith and credit to another state's custody determination if that state's court refused to extend full faith and credit to an earlier Vermont custody order. We will not give "greater faith and credit to the judgments of the courts of other states" than we give to our own courts' judgments. Id. at 394, 640 A.2d at 546 (quotations omitted). The same reasoning applies here.

¶ 20. Lisa is making the curious argument that if the PKPA does not apply to this dispute, Vermont will be required to give full faith and credit to the Virginia parentage decision and custody and visitation order. Our cases have routinely stated exactly the opposite position--that is, in the absence of a requirement imposed by the PKPA, Vermont courts will not extend full faith and credit to another state's custody and visitation order. See Rocissono v. Spykes, 170 Vt. 309, 316, 749 A.2d 592, 597 (2000) (Arizona's assertion of jurisdiction over custody dispute was inconsistent with the PKPA "and thus not entitled to full faith and credit"); Columb v. Columb, 161 Vt. 103, 107, 633 A.2d 689, 691 (1993) (custody order that does not meet PKPA requirements "is not entitled to full faith and credit in other states").

¶ 21. In any event, we reject the argument that the PKPA is inapplicable. The PKPA applies to custody or visitation determinations. 28 U.S.C. § 1738A(a). It defines a "custody determination" as "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." Id. § 1738A(b)(3). It defines a visitation determination in nearly identical terms. Id. § 1738A(b)(9). Lisa's dissolution petition to the Rutland Family Court sought a custody determination, and the court's temporary order included a temporary determination of both custody and visitation. Lisa's parentage petition in the Virginia court sought a determination that Janet had no parental rights, and the Virginia court issued a temporary order requiring Janet's visitation to be supervised and then a permanent order that Janet had no right to visit IMJ. Plainly, the Virginia court decisions included visitation determinations as the term is defined in the PKPA. Just as plainly, the PKPA applied to those decisions.

¶ 22. Lisa's argument, then, is that a custody or visitation determination arising out of one kind of proceeding is covered by the PKPA, and a custody or visitation determination arising out of another is not. All of the decisions interpreting the PKPA in private family disputes conclude that the PKPA draws no such distinction. Martinez v. Reed, 623 F.Supp. 1050, 1055 (E.D.La.1985) (PKPA applies to guardianship decision); Guernsey v. Guernsey, 794 So.2d 1108,

1110 (Ala.Civ.App.1998) (parentage); Ray v. Ray, 494 So.2d 634, 637 (Ala.Civ.App.1986) (guardianship); In re Pima County Juvenile Action No. J-78632, 147 Ariz. 527, 711 P.2d 1200, 1206 (Ct.App.1985) (dependency proceeding initiated by grandfather), rev'd on other grounds, 147 Ariz. 584, 712 P.2d 431, 435 (1986); In re B.B.R., 566 A.2d 1032, 1040 n. 24 (D.C.1989) (habeas corpus); E.E.B. v. D.A., 89 N.J. 595, 446 A.2d 871, 876 (1982) (habeas corpus); In re Bean, 132 N.C.App. 363, 511 S.E.2d 683, 686 (1999) (termination of parental rights). In fact, this Court recently held that the PKPA applied to a guardianship proceeding from another state. Jackson v. Hendricks, 2005 VT 113, ¶ 9 n. 1, 179 Vt. ----, 893 A.2d 292 (mem.). The one case on which Lisa relies found that the PKPA did not apply to a parentage proceeding precisely because no party asked for a custody or visitation order and the court did not address custody or visitation. Sheila L. v. Ronald P.M., 195 W.Va. 210, 465 S.E.2d 210, 221 (1995). Such a situation is inapposite to the circumstances in this case.

¶ 23. We recognize that some courts have held the PKPA does not apply to neglect and dependency proceedings where the state is intervening to protect the child, see In re A.L.H., 160 Vt. 410, 413 n. 2, 630 A.2d 1288, 1290 n. 2 (1993) (citing cases), and Lisa has referenced these cases. These cases rely on three rationales: (1) the UCCJA explicitly applies to "neglect and dependency proceedings," 15 V.S.A. § 1031(3), and the PKPA, which was drafted to

generally track the UCCJA, intentionally omitted that language, see L.G. v. People, 890 P.2d 647, 661-62 (Colo.1995); In re L.W., 241 Neb. 84, 486 N.W.2d 486, 500-01 (1992); State ex rel. Dep't of Human Servs. v. Avinger, 104 N.M. 255, 720 P.2d 290, 292 (1986); (2) the purpose of the PKPA is to address the interstate enforcement of child custody decrees, and, in particular, particularly to address child-snatching, and not to interfere with a state's protection of a dependent and neglected child, see L.G., 890 P.2d at 661-62; In re L.W., 486 N.W.2d at 500-01; Avinger, 720 P.2d at 292; and (3) the continuing jurisdiction section of the PKPA, § 1738A(d), refers to a contestant, a term defined in § 1738A(b)(2) not to include the state, see In re L.W., 486 N.W.2d at 500-01. None of these rationales suggests that the PKPA should not apply in this visitation dispute between private parties.

¶ 24. For the above reasons, we reject Lisa's argument that the PKPA does not apply to the Virginia parentage decision. We hold that the PKPA applies to this case and does not command the Vermont court to give full faith and credit to the parentage decision of the Virginia court that was issued in violation of the PKPA.

¶ 25. Lisa's second argument is that the PKPA has been superseded by the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2000), and DOMA requires that the Vermont court give full faith and credit to the Virginia decision and order. DOMA reads:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id. Lisa argues that a Vermont civil union is a relationship between persons of the same sex that is treated as a marriage under Vermont law and that Janet's right of visitation, if any, arises from that relationship. Thus, she argues that DOMA authorized the Virginia court to reject any right of visitation based on the Vermont court order, and the Vermont court must give full faith and credit to the Virginia order.

¶ 26. The family court concluded that DOMA would not provide Lisa the relief she sought:

> Nor is the application of the PKPA in this case, as Lisa's counsel has suggested, hindered by the more recently enacted Federal Defense of Marriage Act (DOMA).... Whether or not a Virginia court may be permitted under DOMA to decline to give effect to the judicial proceedings in Vermont in a

> Virginia court is not relevant to the essential question before this court, or before the court of Virginia as a prerequisite for exercising its jurisdiction, of whether this Vermont court had jurisdiction under Vermont law over this dispute before it was filed in Virginia. Clearly Vermont has jurisdiction and therefore the Commonwealth of Virginia's judgment is not entitled to full faith and credit.

Janet urges us to affirm on a broader and different ground: that DOMA and the PKPA should be construed to be consistent; this consistent construction would be that DOMA does not apply to custody and visitation orders.

¶ 27. We affirm on the ground employed by the Vermont court. This case is about whether the Vermont court must give full faith and credit to the decision of the Virginia court, and not the reverse. Unlike the PKPA, in no instance does DOMA require a court in one state to give full faith and credit to the decision of a court in another state. Its sole purpose is to provide an authorization not to give full faith and credit in the circumstances covered by the statute. Thus, DOMA does not aid Lisa's attack on the Vermont order.

¶ 28. Under Lisa's interpretation, we would be required to give full faith and credit to the Virginia court's decision not to give effect to the fully valid

order of the Vermont court. Indeed, if we were to accept that argument, the Vermont biological parent of a child born to a civil union could always move to another state to make a visitation order unenforceable in every state, including Vermont. As we discussed above in relation to Lisa's PKPA argument, supra, ¶ 19, we held in Medveskas, 161 Vt. at 394, 640 A.2d at 546, that we will not give "greater faith and credit" to another state's judgment that is in conflict with a valid judgment of our own courts. Because we can affirm on this narrow ground, we need not reach the broader question of whether DOMA, and not the PKPA, governs to determine the effect of a Vermont custody or visitation decision based on a civil union.

¶ 29. Lisa's third ground for arguing the PKPA does not apply is that the civil union was void because both Janet and Lisa were residents of Virginia when they entered the civil union in Vermont, and, as a result, Virginia courts did not have to recognize it. We consider this argument in the next section of the opinion and reject it.

¶ 30. In summary, none of Lisa's arguments change our conclusion that this is a straightforward interstate jurisdictional dispute over custody, and the governing law fully supports the Vermont court's decision to exercise jurisdiction and refuse to follow the conflicting Virginia visitation order.

II. The Validity of the Civil Union

¶ 31. Lisa next argues the civil union of her and Janet is void as a matter of law because it was entered into when both parties were residents of Virginia and would have been void if entered into in Virginia. She then argues that since the civil union is void, the temporary visitation order based upon the civil union is also void. In making these arguments, she relies first upon 15 V.S.A. § 6, which provides:

> A marriage shall not be contracted in this state by a person residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction. Every marriage solemnized in this state in violation of this section shall be null and void.

She argues that because same-sex legal unions are void in Virginia, Vermont must also find their union void. Lisa recognizes that § 6 alone, which applies to marriages, does not void the civil union. As we held in Baker v. State, 170 Vt. 194, 201, 744 A.2d 864, 869 (1999), a union between partners of the same gender is not defined by Vermont law as a marriage. The Legislature explicitly codified this holding in 15 V.S.A. § 8.1999, No. 91 (Adj.Sess.), § 25. Thus, Lisa argues, § 6 applies to civil unions as well as marriages as a result of 15 V.S.A. § 1204(a), a section of the civil union statute, which states:

> Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

Accordingly, Lisa argues § 1204(a) incorporates § 6 and voids her union to Janet.

¶ 32. The Vermont court did not address these arguments because Lisa failed to raise them. Thus, Janet's first response on appeal is that we should not reach Lisa's arguments on this point because they have not been preserved. Janet also notes that even if § 6 applies to civil unions, whether § 6 would even fit the facts of this case is in dispute. For example, at the time the parties entered into the civil union in 2000, Virginia law prohibited "[a] marriage between persons of the same sex" and made such marriages entered into in another state "void" in Virginia, Va.Code Ann. § 20-45.2 (West 2005), but it was silent on the effect of civil unions. Only in 2004 did Virginia enact a comparable statute prohibiting civil unions. Id. § 20-45.3 (effective July 1, 2004). Thus, whether a civil union entered into in Vermont in 2000 would have been void if 15 V.S.A. § 6 applied remains a question. Further, § 6 applies only if the parties are "residing and intending to continue to reside in another state or jurisdiction." The record specifies that Lisa and Janet resided in Virginia at the time of the civil union, but it is silent on their intent for the

future.

¶ 33. Lisa argues that despite these issues, we should decide the validity of the civil union because it is jurisdictional. Although we question that characterization, we exercise our discretion to reach the merits because it involves a pure question of law, on which our review is de novo, see, e.g., Kelly v. Lord, 173 Vt. 21, 34, 783 A.2d 974, 985 (2001) (exercising discretion to hear appeal from nonfinal judgments), and further involves a matter of public interest.

¶ 34. On the merits, we are guided at the outset by familiar canons of statutory construction. Our overall goal in construing a statute is to implement the intent of the Legislature. Farris v. Bryant Grinder Corp., 2005 VT 5, ¶ 8, 177 Vt. 456, 869 A.2d 131. In pursuing this goal, we normally apply the plain meaning of the statute if it is unambiguous. Id. Where there is uncertainty about legislative intent, "we must consider the entire statute, including its subject matter, effects and consequences, as well as the reason for and spirit of the law." In re Hinsdale Farm, 2004 VT 72, ¶ 5, 177 Vt. 115, 858 A.2d 249.

¶ 35. Here, we believe that the plain meaning of the civil union statute, 15 V.S.A. § 1204(a), is inconsistent with Lisa's argument and does not incorporate § 6. Section 1204 plainly addresses the responsibilities of persons who have entered into a civil union and not the eligibility for that status. This plain meaning is reinforced by the fact that the

Legislature specifically included another section in the same chapter, entitled "Requisites of a valid civil union," id. § 1202, referring to eligibility for civil unions, and did not include residency as one of its requirements. More generally, the statute on which Lisa relies to support her claim that the civil union is void, § 6, is part of chapter 1 of Title 15, which establishes the requirements of marriage. Where the Legislature intended that chapter 1's requirements apply to civil unions, it said so directly by a separate provision of the civil union chapter, see id. § 1203 (disallowing parties from entering into civil unions with the same specified relatives the marriage statute also prohibits parties from marrying), or by amending the marriage statute so that it also applied to civil unions, id. § 4 (voiding marriages when previous marriage or civil union is still in force). These provisions would be superfluous if § 1204 generally made chapter 1 applicable to civil unions. Accordingly, there is no indication that the Legislature intended to apply chapter 1 generally to civil unions or to apply specific sections beyond those explicitly adopted.

¶ 36. Beyond the statute's plain language, there are other indications that the Legislature did not intend § 6 apply to civil unions. First, it is evident the Legislature expected that nonresidents would obtain civil unions, as it specifically provided that any town clerk in the state could issue a license to applicants "if neither is a resident of the state." 18 V.S.A. § 5160(a). We take judicial notice that Vermont was

the first state to offer civil unions. Thus, under Lisa's broad interpretation of 15 V.S.A. § 6, which she applies even to states with no explicit prohibition on civil unions, no resident of another state who intended to remain a resident of that state could have validly entered into a Vermont civil union because no other state allowed civil unions at that time. [FN2] Section 5160(a) of Title 18 evidences the absurdity of that claim.

¶ 37. Moreover, where the Legislature intended to impose a residency requirement on couples in civil unions--that is, in the case of dissolution--it stated so explicitly. See 15 V.S.A. § 1206 ("The dissolution of civil unions shall follow the same procedures ... that are involved in the dissolution of marriage ..., including any residency requirements."). In addition, the Legislature specifically required town clerks to provide civil union applicants with information to advise them "that Vermont residency may be required for dissolution of a civil union in Vermont." 18 V.S.A. § 5160(f) (emphasis added). In this context, we take the absence of an explicit statement that residency would normally be required for civil union formation as a strong indication that the Legislature intended no such requirement.

¶ 38. Finally, the Legislature has charged the Secretary of State and the Commissioner of Health with providing public information about the requirements and procedures of the statute, see 15 V.S.A. § 1207(a) (Commissioner of Health to supply forms); 18 V.S.A. § 5160(f) (Secretary of State to

provide information to be handed out by town clerks), and created and charged the Vermont Civil Union Review Commission with implementing a plan "to inform members of the public ... about the act," 1999, No. 91 (Adj.Sess.), § 40(c). We give some deference to the construction of the applicable statutes by these implementing agencies. Laumann v. Dep't of Pub. Safety, 2004 VT 60, ¶ 7, 177 Vt. 52, 857 A.2d 309; Agency of Natural Res. v. Deso, 2003 VT 36, ¶ 14, 175 Vt. 513, 824 A.2d 558 (mem.). [FN3] The Secretary of State has created an online pamphlet, entitled "The Vermont Guide to Civil Unions" (revised Aug. 2005), which states in Part 3 that "[t]here are no residency or citizenship requirements for Vermont Civil Unions." http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html (last visited July 31, 2006). The Commissioner of Health has also posted an online pamphlet entitled "Civil Unions in Vermont: Questions and Answers to Help you Plan your Vermont Civil Union." It states in response to the first question, "Who can form a civil union?," that "[y]ou do not have to be Vermont residents to form a civil union in Vermont." http://healthvermont.gov/research/records/civil.pdf (last visited July 31, 2006). Necessarily, these officials have adopted a different construction of the civil union statutes from that urged by Lisa in this case.

¶ 39. Although the Vermont Civil Union Review Commission has not provided additional public commentary, it issued a report in 2002 that stated that 4,371 civil unions had been completed as of

January 2002, and that:

> Most civil unions have involved parties who are nonresidents. The proportion of civil unions involving Vermont residents continues to decrease. In July 2000, 29% of civil unions involved Vermont residents. This number dropped to 22% in August and September of 2000, and, currently, 11% of people entering civil unions are Vermonters. Residents from 48 states, the District of Columbia, Canada and several other countries have established civil unions in Vermont. Besides Vermont, the largest numbers of civil union parties have been residents of New York, Massachusetts and California.

Report of the Vt. Civil Union Review Comm'n, Finding 3 (Jan.2002), http://www.leg.state.vt.us/baker/Final CURCReportfor2002.htm (last visited July 31, 2006). It concluded that "Act 91 Is Working As Intended." Id., Conclusion 6. The Commission could not reach that conclusion if it found that the Legislature intended to prohibit nonresidents from entering civil unions in Vermont because their states of residency would not recognize their unions. Further, the Legislature has taken no action in response to the Commission's report, as one might expect if the overwhelming use of civil unions by nonresidents was unintended.

¶ 40. We hold that the Legislature did not intend to apply to civil unions the prohibition on certain nonresidents entering into Vermont marriages. As a result, we hold that the civil union between Lisa and Janet was valid. Accordingly, we reject Lisa's argument that the temporary visitation order is void because the civil union is void.

III. The Parentage Determination

¶ 41. Lisa's third argument attacks the temporary visitation order on the basis that Janet is not a parent of IMJ. [FN4] She argues that Janet cannot be a parent of IMJ because she is not biologically connected to her. In making this argument, Lisa looks primarily to the Parentage Proceedings Act, 15 V.S.A. §§ 301-308. Under § 308(4):

> A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if ... (4) the child is born while the husband and wife are legally married to each other.

This statute applies to civil unions by virtue of § 1204(f):

> (f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the

> same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

See also id. § 1204(d) ("The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.").

¶ 42. Lisa contends that because the Legislature used the word "natural" in § 308(4), it must have intended the presumption of parentage to apply only to a person who is biologically connected to the child. She argues, therefore, that because she is IMJ's biological mother, and Janet is not, Janet cannot be a parent of IMJ. If Janet is not IMJ's parent, Lisa continues, then the family court erred in awarding Janet visitation.

¶ 43. The Vermont court responded to Lisa's argument by holding that, because Lisa gave birth through artificial insemination, the presumption of parentage contained in § 308 applied to Janet, just as it would have applied to Lisa's husband if she had had one at the time of the birth.

¶ 44. Section 308(4) was not intended to produce the result Lisa advances and is ultimately irrelevant to the circumstances creating parenthood in this case. The presumption provision was added to § 308 quite recently, see 1993, No. 228 (Adj.Sess.), § 13 (adding subsection (4) to 15 V.S.A. § 308), apparently to make

the collection of child support easier, see 15 V.S.A. § 293(b) (where presumption applies, it is a "sufficient basis for initiating a support action ... without any further proceedings to establish parentage"). We have examined the legislative history of the statute and can find no indication that it was intended to govern the rights of parentage of children born through artificial insemination or to same-sex partners, or to do anything other than provide a speedy recovery of child support. Thus, to accept Lisa's argument, we would have to find that Lisa's desired effect of § 308(4) is an unintended consequence of a legislative amendment enacted for a different purpose. As explained below, we find § 308(4) does not have that unintended consequence.

¶ 45. Ultimately, we have both a short and a long answer to Lisa's argument regarding the effect of § 308(4), and, because of the public interest in the issue, we provide both. The short answer is that the issue is controlled by this Court's decision in Paquette v. Paquette, 146 Vt. 83, 499 A.2d 23 (1985), under which the presumption of parentage contained in § 308 is irrelevant. In Paquette, the parties were involved in a divorce and the husband sought custody of both the child born of the marriage and another child born of the wife's prior marriage. The lower court ruled that custody could not be awarded to a stepfather and, on that basis, denied the husband custody of the older child. On appeal, this Court reversed, holding that where the stepparent has assumed the role of a parent with respect to the

child--that is, had acted "in loco parentis"--the lower court can give custody to the stepparent, over the opposition of the biological parent, if it finds that it is in the best interest of the child to do so and "the natural parent is unfit or ... extraordinary circumstances exist to warrant such a custodial order." Id. at 92, 499 A.2d at 30.

¶ 46. Paquette does not explicitly discuss visitation, but its rationale fully applies to visitation as well as to custody. See S. Silverman, Stepparent Visitation Rights: Toward the Best Interests of the Child, 30 J. Fam. L. 943, 948 (1992) (characterizing Paquette as a stepparent visitation case). In fact, the concerns expressed about the possible interference with the rights of biological parents are of much less weight in the case of visitation.

¶ 47. Under Paquette, regardless of the meaning of 15 V.S.A. § 308(4), Janet has at least the status of a stepparent of IMJ by virtue of § 1204(d) and (f). Assuming extraordinary circumstances are even required for a visitation order, we conclude that extraordinary circumstances are present in this case. The court's findings demonstrate that Janet acted in loco parentis with respect to IMJ as long as Janet and Lisa were together. Thus, our short answer to Lisa's argument is that the visitation order is supported by Paquette even if Janet is not considered IMJ's parent under § 308(4).

¶ 48. There is also a longer answer to Lisa's argument that biology must control the parentage

issue. We find that Janet has status as a parent, even beyond her stepparent status under Paquette. If we were to accept Lisa's opposing position and conclude biology controlled, a child born from artificial insemination would have no second parent--whether that status is sought by a man married to the child's mother or by a woman or man in a civil union with the child's biological parent--unless the putative second parent adopted the child. In fact, the logical extension of Lisa's position that a biological connection is necessary for parentage is that the husband of a wife who bears an artificially inseminated child cannot be the father of that child, just like a civil union spouse cannot be a parent to the child. Such a holding would cause tremendous disruption and uncertainty to some existing families who have conceived via artificial insemination or other means of reproductive technology, and we must tread carefully so that we incur such a consequence only if necessary. As a result, we reach the broader and longer answer to Lisa's argument and conclude that such a holding would be wrong.

¶ 49. We are facing a situation similar to that in In re B.L.V.B., 160 Vt. 368, 628 A.2d 1271 (1993), which was decided before the civil union law and involved a same-gender couple. As in this case, one member of the couple in In re B.L.V.B. conceived a child through artificial insemination, and her partner sought to adopt the child to also become a parent. The probate court ruled that the governing statute, which stated that a child's natural parent's rights shall not be

affected when the parent's spouse adopts the child, required that if the adoption were granted to the same-sex partner, the biological mother's parental rights would be terminated because the adopting parent was not the biological parent's spouse (or the child's stepparent).

¶ 50. Despite the language of the governing statute, we reversed in that case, holding that the probate court's result was at odds with the intent of the Legislature: "[W]e cannot conclude that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a partner." Id. at 373, 628 A.2d at 1274. We stated further:

> When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest....

As the case law from other jurisdictions illustrates, our paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in

which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that "legal strangers" who are de facto parents may be awarded custody or visitation or reached for support.

Id. at 375-76, 628 A.2d at 1275-76.

¶ 51. The disruption that would be caused by requiring adoption of all children conceived by artificial insemination by nonbiological parents is particularly at variance with the legislative intent for civil unions. The Legislature's intent in enacting the civil union laws was to create legal equality between relationships based on civil unions and those based on marriage. The Legislature added a separate section on the construction of the civil union statutes that provides in part:

> Treating the benefits, protections and responsibilities of civil marriage differently from the benefits, protections and responsibilities of civil unions is permissible only when clearly necessary because the gender-based text of a statute, rule or judicial precedent would otherwise produce an unjust, unwarranted, or confusing result, and

> different treatment would promote or enhance, and would not diminish, the common benefits and protections that flow from marriage under Vermont law.

1999, No. 91 (Adj. Sess.), § 39(a). The result of Lisa's statutory argument would be to produce separate benefits and protections for couples in civil unions. Under her argument, no partner in a civil union could be the parent of a child conceived by the other partner without formally adopting that child.

¶ 52. As in In re B.L.V.B., we face the problem here of a family with a child created by artificial insemination, and the Legislature has not dealt directly with new reproductive technologies and the families that result from those technologies. Nonetheless, the courts must define and protect the rights and interests of the children that are part of these families. See In re B.L.V.B., 160 Vt. at 376, 628 A.2d at 1276; In re Estate of Kolacy, 332 N.J. Super. 593, 753 A.2d 1257, 1263 (2000) (finding that even though child was conceived via assisted reproductive technology, "once a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity and legal protection which that status requires"). We express, as many other courts have, a preference for legislative action, see, e.g., In re M.J., 203 Ill. 2d 526, 272 Ill. Dec. 329, 787 N.E.2d 144, 150 (2003); Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 756 N.E.2d 1133, 1139 (2001), but in the absence of that action, we must protect the best interests of the child.

¶ 53. With this background in mind, we turn back to § 308(4). The purpose of the statute is to create a rebuttable presumption, the main effect of which is to assign the burden of production. Godin v. Godin, 168 Vt. 514, 530, 725 A.2d 904, 915 (1998) (Dooley, J., dissenting). Thus, the presumption serves the purpose of allowing more summary support actions even in the absence of a parentage adjudication, which effectively eases child support decisions. See 15 V.S.A. § 293(b) (where presumption of parentage under § 308 applies, a support action against the presumed parent may be filed without a prior parentage adjudication). Because the statute creates only a presumption, however, it does not prevent proof of the fact in issue through other means. Thus, if the presumption did not apply, [FN5] the only effect in this case would be that Janet would have the burden of production to prove parenthood, a burden she assumed in presenting her case to the family court. Where the presumption cannot apply, it does not mean the individual is not a parent; it simply means we must look to see whether parentage exists without the use of the presumption--the same way we would have determined parentage before the adoption of § 308(4).

¶ 54. Lisa focuses almost exclusively on the word "natural," finding in its use the legislative intent that only biological parents can be parents for purposes of the parentage statute. [FN6] We find this to be an overly broad reading of the language. The parentage act does not include a definition of "parent." It does

not state that only a natural parent is a parent for purposes of the statute. In fact, the statute is primarily procedural, leaving it to the courts to define who is a parent for purposes of a parentage adjudication. Given its origin and history, it is far more likely that the legislative purpose was to allow for summary child support adjudication in cases where biological parenthood is almost indisputable.

¶ 55. We reach then the ultimate question--whether Janet is a parent within the meaning of the parentage act--without consideration of § 308, which is irrelevant to both sides of the argument in this case. We have held that the term "parent" is specific to the context of the family involved. For instance, in In re S.B.L., 150 Vt. 294, 302, 553 A.2d 1078, 1083-84 (1988), we held that the biological father of a child born out of wedlock is not a "parent" for purposes of 14 V.S.A. § 2645, one of our guardianship statutes. Again, we stress that the difficulty in interpretation in this context arises because the Legislature has not addressed assisted reproductive technologies. Thus, we cannot discern in the parentage statutes any helpful legislative intent for such familial circumstances.

¶ 56. Many factors are present here that support a conclusion that Janet is a parent, including, first and foremost, that Janet and Lisa were in a valid legal union at the time of the child's birth. The other factors include the following. It was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision

that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent. The sperm donor was anonymous and is making no claim to be IMJ's parent. If Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination. See generally People v. Sorensen, 68 Cal.2d 280, 66 Cal.Rptr. 7, 437 P.2d 495 (1968). Because of the equality of treatment of partners in civil unions, the same result applies to Lisa. 15 V.S.A. § 1204.

¶ 57. Virtually all modern decisions from other jurisdictions support this result, although the theories vary. See, e.g., Brown v. Brown, 83 Ark.App. 217, 125 S.W.3d 840, 844 (Ct.App.2003) (husband estopped from denying child support where husband knew wife was using artificial insemination to have child); Sorensen, 66 Cal.Rptr. 7, 437 P.2d at 498-500 (husband is lawful father of child conceived through artificial insemination born during marriage to child's mother); In re Buzzanca, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280, 286-87 (Ct.App.1998) (finding virtually all decisions hold husband to be parent based on his consent to artificial insemination); In re M.J., 272 Ill.Dec. 329, 787 N.E.2d at 152 (mother of

children conceived through artificial insemination may seek to establish paternity of man with whom she had ten-year intimate relationship based on theories of "oral contract or promissory estoppel"); Levin v. Levin, 645 N.E.2d 601, 604-05 (Ind.1994) (husband who orally consented to artificial insemination of wife estopped from denying fatherhood of child); R.S. v. R.S., 9 Kan.App.2d 39, 670 P.2d 923, 928 (1983) (husband who orally consented to artificial insemination of wife estopped from denying fatherhood); State ex rel. H. v. P., 90 A.D.2d 434, 457 N.Y.S.2d 488, 492 (1982) (wife estopped from denying husband's paternity where she fostered parent-child relationship); Brooks v. Fair, 40 Ohio App.3d 202, 532 N.E.2d 208, 212-13 (Ct.App.1988) (public policy disallows wife from denying paternity of husband where parties agreed during marriage to conceive via means of artificial insemination); In re Baby Doe, 291 S.C. 389, 353 S.E.2d 877, 878 (1987) (husband is legal father of child where he consented to artificial insemination of wife during marriage); see generally A. Stephens, Annotation, Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 A.L.R.4th 655 (1991). Some courts find the party a parent as a result of contract theory or estoppel. E.g., R.S., 670 P.2d at 928. Estoppel is often invoked because of the strong reliance interests that arise from consensual artificial insemination. Other courts reach the result more as a matter of policy, particularly stressing the adverse consequences of

leaving the child without a parent despite the clear intention of the parties. E.g., Brooks, 532 N.E.2d at 212-13. We adopt the result in this case as a matter of policy, and to implement the intent of the parties.

¶ 58. This is not a close case under the precedents from other states. Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case. We do note that, in accordance with the common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage. See People ex rel. R.T.L., 780 P.2d 508, 515 n. 11 (Colo.1989) ("We acknowledge that the presumption that a child born during wedlock is the legitimate child of the marriage was one of the strongest presumptions known to the common law."); Cicero v. Cicero, 58 A.D.2d 573, 395 N.Y.S.2d 117, 117 (1977) (presumption of legitimacy attached to "issue of the marriage"); LC v. TL, 870 P.2d 374, 380 (Wyo.1994) ("The presumption of legitimacy is one of the strongest in law."); see also Godin, 168 Vt. at 522, 725 A.2d at 910 ("Thus, the State retains a strong and direct interest in ensuring that children born of a marriage do not suffer financially or psychologically merely because of a parent's belated and self-serving concern over a child's biological origins.").

¶ 59. Lisa raises three additional reasons why we cannot affirm the temporary visitation award. First, she argues that awarding Janet visitation, without a

finding that Lisa is unfit to parent, interferes with her exclusive constitutional right to parent her child. See Troxel v. Granville, 530 U.S. 57, 72-73, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (indicating fundamental due process right of parents to make child rearing decisions). This argument was not adequately raised below and has been waived. See Will v. Mill Condo. Owners' Ass'n, 2004 VT 22, ¶ 4, 176 Vt. 380, 848 A.2d 336 (rejecting claim that mere mention of argument in one pretrial memorandum preserved issue for appeal). In any event, we reject it. Janet was awarded visitation because she is a parent of IMJ. Lisa's parental rights are not exclusive. See In re L.B., 155 Wash.2d 679, 122 P.3d 161, 178 (2005).

¶ 60. We have a similar response to Lisa's argument that Janet's parental status must be determined under Virginia law. Again, the argument was not preserved below. See Adams v. Adams, 2005 VT 4, ¶ 15, 177 Vt. 448, 869 A.2d 124 (arguments not raised below are not preserved for appeal). In any event, we also reject this argument. We have adopted the "most significant relationship" test of the Restatement (Second) of Conflict of Laws § 287 (1971) in determining choice-of-law questions. Id. (law of the state with the most significant relationship to the child and parent determines legitimacy); see Myers v. Langlois, 168 Vt. 432, 434, 721 A.2d 129, 130 (1998). As we held in the first section, the Vermont court had jurisdiction to adjudicate custody and visitation of IMJ under both the PKPA and the UCCJA. Although these acts primarily determine jurisdiction, their

provisions are such that they establish the state with the most significant relationship to a child custody or visitation dispute. Stubbs v. Weathersby, 320 Or. 620, 892 P.2d 991, 997-98 (1995). Accordingly, we conclude that where jurisdiction is exercised consistent with the PKPA and UCCJA, the law of the forum state is applicable. In this case, as discussed in depth supra, ¶¶ 9-18, Vermont had jurisdiction under both statutes, and, accordingly, Vermont law applies here.

¶ 61. In reaching this conclusion, we do not hold that there is an actual conflict between the law of Vermont and that of Virginia with respect to the power of the court to award visitation in cases involving same-gender partners. The parties have not pointed to any Virginia cases on point, and we have not found any. We do note, however, that a growing number of courts have recognized parental rights in a same-gender partner of a person who adopts a child or conceives through artificial insemination. See Elisa B. v. Super. Ct., 37 Cal.4th 108, 33 Cal.Rptr.3d 46, 117 P.3d 660, 670 (2005) (same-gender partner is presumed mother of twins conceived by artificial insemination and is responsible for child support); In re E.L.M.C., 100 P.3d 546, 562 (Colo.Ct.App.2004) (same-gender partner who is psychological parent of child adopted by other partner may be awarded joint parental responsibilities); C.E.W. v. D.E.W., 845 A.2d 1146, 1151-52 (Me.2004) (court may award parental rights and responsibilities to same-gender partner who is de facto parent of child); E.N.O. v. L.M.M., 429

Mass. 824, 711 N.E.2d 886, 892-93 (1999) (probate court can provide visitation to same-gender partner of biological mother who is de facto parent of child); V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539, 552-54 (2000) (same-gender partner who is a psychological parent to child may be awarded custody of, or visitation with, the child); T.B. v. L.R.M., 567 Pa. 222, 786 A.2d 913, 920 (2001) (where same-gender partner is in loco parentis with consent of child's biological mother, court may award partial custody or visitation); Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I.2000) (court may award visitation to same-gender partner based on theory of estoppel); In re L.B., 122 P.3d at 176(same-gender partner who is de facto parent has same right to custody as biological mother); In re H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419, 435-37 (1995) (same-gender partner with parent-like relationship with child can be awarded visitation, but not custody). In these cases, there was no marriage or civil union between the partners. This result was endorsed in 2000 by the American Law Institute. Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03, cmt. (b)(iii), at 114. It may be that the Virginia courts will follow this trend.

¶ 62. Lisa next argues that the court erred by awarding visitation without first determining parentage. Temporary relief requests in divorce or dissolution proceedings must be heard and decided promptly. 15 V.S.A. § 594a. Necessarily, a temporary order will not be based on the full record required to

support a final order. A speedy decision was required in this case to allow Janet to have some contact with IMJ, pending resolution of the dispute over custody and visitation. Meanwhile, Lisa went through three lawyers during the early stage of the dissolution action. Her complaint alleged that Janet was a parent of IMJ, and she maintained that position through the first day of the temporary relief hearing. Indeed, her counsel stated on the record that Lisa waived any claim that Janet was not a parent of IMJ. Thereafter, with a new lawyer, she attempted to change her position, to roughly the position she espouses here. She sought to delay the temporary relief proceeding while she adjudicated whether Janet was a parent, and she argued that the court should give no interim relief until parenthood was fully resolved. We believe the family court acted within its broad discretion in awarding temporary visitation as it did, even if it could not make a final determination of parentage. See id. (court can make such orders pending final hearing as it could upon final hearing); V.R.F.P. 4(c)(2).

¶ 63. In any event, the timing of the court's action was harmless in this case. The family court eventually ruled that Janet had parental status with respect to IMJ, a ruling we have affirmed. The relevant facts are largely undisputed and were before the court when it issued the temporary order. Lisa sought to delay the ruling on the basis that Janet was not the biological mother of IMJ, a fact that is undisputed and is not determinative. Thus, the

timing of the court's action has no significance at this time. The Commonwealth of Virginia's judgment regarding parentage is not entitled to full faith and credit.

IV. Contempt

¶ 64. Finally, Lisa argues that we should reverse the contempt determination because it is unsupported by the record. The transcripts show that on May 26, 2004, the trial judge granted Janet parent-child contact via a bench ruling issued on the record, and Janet's lawyer was to prepare a written order. The oral order provided for visitation for the weekends of June 4-6 and June 18-20, the week in July starting July 25, and one week per month in Vermont starting August 2004. The order also provided for Janet to have daily telephone contact with IMJ. At the hearing, Lisa explicitly stated that she waived any objection to the visitation on June 4-6, June 18-20, and for the week in July beginning July 25: "[W]e have no objection to the visitation proposed [regarding these dates] ...." Janet's lawyer filed the proposed order on May 28, but it was not signed and filed until June 17. Meanwhile, on June 9, Lisa filed a motion to reconsider the order, saying that it had been "issued from the bench." The written order, requiring the same visitation as previously had been ordered from the bench, was served on Lisa on June 25.

¶ 65. On June 5, 2004, despite the fact that the order had not yet been reduced to writing, Lisa complied with the visitation order for that weekend. Nonetheless, although the parties' versions of the reasons for the lack of visitation differ, Janet was not able to see the child as ordered on the weekend of June 18 or during the week of July 25. Janet has not had parent-child visitation with IMJ since the weekend of June 4, 2004. Both the oral and written orders also provided that Janet could have telephone contact with IMJ "once per day," but Lisa did not allow this contact, and it did not occur. Janet moved for a determination that Lisa was in contempt of the court order, and the court held a hearing at which both Janet and Lisa testified. Lisa acknowledged at the contempt hearing that, even before an order had been issued by the Virginia court, she did not agree with the family court's visitation order, and had no intention of complying with it. On September 2, the Vermont court found that Lisa had failed to comply with the parent-child contact requirements, specifically finding that "Lisa has wilfully refused to comply with this court's order regarding visitation since mid-June, solely because she does not like it."

¶ 66. Lisa makes no argument on appeal to justify her refusal to allow telephone contact between Janet and IMJ. At the contempt hearing, Lisa suggested that the telephone contact did not occur because the times during which Janet attempted to contact the child were inconvenient; Janet, in turn, stated that her numerous and repeated attempts always resulted

in busy signals, rebuffs by Lisa, and answering machines. Lisa acknowledges that Janet and IMJ did not actually converse on the telephone after the weekend of June 18, as was required per the temporary order.

¶ 67. Lisa argues on appeal that she did not violate the order with respect to the July visitation because Janet appeared at her home when she knew Lisa and IMJ would be at church. Again, the court's order was explicit that Janet was entitled to visitation starting on July 25, 2004, and the record is clear that the ordered visitation did not occur despite Janet's attempt.

¶ 68. With respect to the June visitation, Lisa makes a legal argument that she had no obligation to provide visitation because the written order had not been served upon her. Lisa's argument is disingenuous. The family court made the temporary visitation order orally from the bench and on the record on May 26, 2004. Lisa's presence at that hearing, with representation by counsel, is undisputed. Furthermore, at the hearing, Lisa explicitly stated through her attorney that she did not object to the June and July visitation dates. Lisa then further acknowledged the oral visitation order in her motion to set it aside. Lisa has not argued, and cannot argue, that she had no notice of the court's visitation order, nor does she argue that it did not provide for visitation during the weekend of June 18. She argues only that a written order had not yet been served as of the June 18 visitation date.

¶ 69. We can find no requirement that a temporary visitation order be in writing, beyond the writing created by the transcript of an oral order placed on the record. We have recently affirmed a contempt adjudication based on an oral visitation order. See Root v. Root, 2005 VT 93, ¶ 13, 178 Vt. 634, 882 A.2d 1202 (mem.) (affirming contempt based on violation of oral order that reiterated preexisting obligation parent conceded was not followed); see also 15 V.S.A. § 603 (authorizing contempt proceedings for disobeying "lawful order," without reference to manner of order). We similarly conclude that the oral order and full notice to Lisa supported the contempt adjudication in this case.

¶ 70. Apparently, Lisa's response to her failure to comply with the August visitation provisions is that the Virginia decision superseded the Vermont order. We have rejected that argument as a matter of law. Moreover, Lisa could have complied with the Vermont order without violating any order from the Virginia court.

¶ 71. The family court found that Lisa had "wilfully refused to comply with [its] order regarding visitation," and we find no reason to overturn that finding. See Payrits v. Payrits, 171 Vt. 50, 52-53, 757 A.2d 469, 472 (2000) (family court findings will not be overturned unless clearly erroneous). For the above reasons, we reject Lisa's arguments that the family court erred in finding her in contempt and remand for the imposition of sanctions.

¶ 72. In conclusion, the family court properly assumed jurisdiction of the action to dissolve the civil union between Lisa and Janet. The civil union was not void. The court properly found that it had jurisdiction to issue a temporary order providing Janet visitation with IMJ, and it was not required to recognize and enforce a conflicting decision of the Virginia court. Finally, the record supports the family court's decision that Lisa is in contempt of court for willfully violating the temporary visitation order.

Affirmed and remanded.

FN1. For clarity, we will refer to the parties by their first names.

FN2. Currently, California has a statute authorizing domestic partnerships, Cal. Fam.Code § 297 (West 2006), and Connecticut has a statute authorizing civil unions, Conn. Gen.Stat. §§ 46b-38aa to 46b-38oo (2006).

FN3. This might be viewed as an unconventional application of the deference rule because civil union licenses are issued by town clerks and not by the Secretary of State and Commissioner of Health. Under the statutory scheme, however, the town clerks are acting under the guidance and direction of the secretary and commissioner. If the secretary and

commissioner misconstrue the statute, the lives of many civil union applicants could be dramatically affected. Indeed, the report of the Vermont Civil Union Review Commission, discussed infra, ¶ 39, indicates that if we invalidated the officials' construction of the statutory scheme in favor of Lisa's interpretation, it is likely that the vast majority of civil unions, numbering in the thousands, would be declared void were the provisions of 15 V.S.A. § 6 now applied to civil unions. We find this to be more evidence that we are effectuating the Legislature's intent on this point.

FN4. Lisa's argument assumes that the court could not issue a temporary visitation or custody order pending a determination of parentage in a civil union dissolution proceeding. The dissolution proceeding is subject to the same procedures as a divorce proceeding. 15 V.S.A. § 1206; V.R.F.P. 4(a)(1). The Legislature has provided broad authority to award temporary relief in a divorce. 15 V.S.A. § 594a; see also V.R.F.P. 4(c)(2). Generally, the procedures applicable to a divorce are applicable to a parentage action. V.R.F.P. 4(a)(1). Thus, we are not prepared to accept Lisa's assumption. In any event, the facts are generally undisputed, and, as we hold in the text, the issue is one of law so it does not matter when the parentage determination was made in this case.

FN5. As we noted in Godin, the presumption of paternity of the husband of the mother originated at common law. 168 Vt. at 521-22, 725 A.2d at 909-10 (citing numerous historical common-law conclusions

and principles for finding parentage as to both legal spouses for the child born in that union). Prior to the adoption of the recent statute, we did not have the opportunity to determine whether Vermont would recognize the common-law presumption. In view of the limited purpose of the statute--to facilitate the collection of child support--it is possible that any common-law presumption would survive. Nonetheless, we need not rely on a presumption here because the court had sufficient facts before it to determine that Janet was the parent of IMJ without the aid of a presumption.

FN6. Lisa's argument presumes that "natural" means biological. She bases that argument on our opinion in Godin, although that decision does not contain that holding explicitly. We note that other courts have not always equated these terms. E.g., In re Nicholas H., 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932, 937 (2002).

APPENDIX M

STATE OF VERMONT

RUTLAND COUNTY, SS

RUTLAND FAMILY COURT

DOCKET NO. 454-11-03

LISA MILLER-JENKINS,

Plaintiff,

v.

JANET MILLER-JENKINS,

Defendant.

Filed November 17, 2004.

RULING ON PLAINTIFF'S MOTION TO WITHDRAW WAIVER TO CHALLENGE PRESUMPTION OF PARENTAGE

Plaintiff and defendant are parties to a Vermont civil union seeking dissolution of that union. The present dispute concerns this court's temporary order of parental rights and responsibilities

concerning the minor child IMJ, born during the parties' civil union. The matter presently before the court is Plaintiff Lisa Miller-Jenkins' motion to withdraw a "waiver" to challenge the presumption of Defendant Janet Miller-Jenkins' status as a parent of the minor child IMJ. FN1

Procedural Facts

The procedural facts and history of this case are both relevant to the motion and necessary to understand the context of these proceedings. Lisa initiated the action in this court by filing a complaint for civil union dissolution on November 24, 2003. In her pro se complaint, Lisa listed IMJ as a biological or adoptive child of the civil union. She requested that the court dissolve the civil union, award her legal and physical rights and responsibilities for IMJ, award Janet suitable parent/child contact (supervised), and award payment of child support. Janet requested a temporary order on the issues of parental rights and responsibilities, parent-child contact and property division. Janet also filed an answer and counterclaim, acknowledging that IMJ was a child of the civil union, and seeking that the court award legal and physical rights and responsibilities to her and give Lisa suitable parent/child contact.

Lisa's first attorney, Linda Reis, entered an appearance on Lisa's behalf on January 9, 2004. The hearing for a temporary order was set for February

25, 2004, and then rescheduled for March 15, 2004 on the plaintiff's request that there was not enough time allocated on the February date. A few days prior to the March hearing, Attorney Reis moved to withdraw as Lisa's attorney, stating that Lisa had hired other counsel and instructed her to discontinue work on her case. This court granted the motion conditioned upon the temporary hearing scheduled for March 15 not being continued. Lisa's second attorney, Deborah Lashman, entered an appearance on Lisa's behalf on March 12, 2004.

In a prior status conference, Attorney Reis had raised the question of parental status in the civil union context. At the start of the March 15 hearing, the court asked whether Lisa was still raising that as an issue. Attorney Lashman responded that her interpretation of the law was different from Attorney Reis', and that she believed that because the child was born of the civil union, the presumption was that both parties were legal parents. In answer to the court's inquiry, Attorney Lashman represented that her client was waiving the issue. The court proceeded with the hearing. This discussion took place in the courtroom, on the record, while Lisa was present.

Although the March 15 hearing on the temporary order lasted several hours, testimony was not completed. The matter was continued and scheduled for completion on May 26. On May 3, Attorney Lashman moved to withdraw on the grounds of a "material breakdown" in the attorney/client relationship. She also sent to the

court a notice of pro se appearance signed by Lisa. On May 14, Lisa filed a motion form with the court asking that Janet be held in contempt of a prior order relating to property issues and requesting a hearing for the purpose of revoking her waiver to challenge parentage. On May 17, Lisa moved to continue the May 26 hearing on the temporary order. The court denied the motion. On May 26, the day of the continued hearing, Lisa's third attorney, Judy Barone, entered an appearance on Lisa's behalf and filed a "Motion to Withdraw Waiver to Challenge Presumption of Parentage." The court declined the request to halt the proceedings and testimony resumed, which resulted in a temporary order granting Lisa sole physical and legal custody and granting Janet parent-child contact. Lisa's motion regarding the "waiver" was set for a hearing before the court on August 24.

The motion asks the court to determine whether Lisa's "waiver" of the parentage issue through her second counsel was valid. Lisa's claim is that her second counsel waived the issue without her knowing consent and without an adequate explanation of how the law in Vermont would apply to the facts of this case. While the "waiver" itself is the focus of the motion before the court, the particular relief sought by Lisa's motion and the legal arguments put forth by Lisa in support of such relief require the court to examine the law of parentage applicable to the facts of this case.

The motion filed on the second day of the temporary hearing sought a discontinuation of the proceedings and asked for time for counsel to brief the court on the "matter of Plaintiff's rebuttal to the presumption of parentage." Plaintiff's request at the hearing, and in subsequent motions, was not simply to have an opportunity to present evidence to rebut a presumption of parentage prior to a final hearing in this case. Rather, she requested that the court postpone the proceedings that had already been delayed more than two months and decline to enter any order of temporary visitation. This request was denied. Subsequently, plaintiff has requested that the court set aside its temporary order – thereby curtailing any enforceable right of Janet to have parent-child contact and depriving her of any parental interest – until such time that the court has an opportunity to hear and render a determination on whatever factual evidence Lisa might have to rebut this presumption.

Moreover, Lisa has raised legal arguments as to whether any presumption of parentage could apply to the facts of this case and whether the court even has jurisdiction to determine parentage where Janet has not initiated a parentage action. The nature of Lisa's arguments leads the court to conclude that Lisa's challenge to Janet's status as a parent is a question of law, rather than one of disputed facts. Thus, the court will first attend to the legal arguments based on the facts of this case before considering the merits of Lisa's motion and her

request for relief.

Background Facts

While the court has not taken evidence specifically in the context of a "parentage" hearing, both parties testified extensively at the hearing on the temporary custody order about their relationship and the conception of IMJ. The following facts were evident from the testimony of the parties, and do not appear to be disputed:

1. The plaintiff Lisa Miller-Jenkins is currently a resident of the Commonwealth of Virginia.

2. The defendant Janet Miller-Jenkins is currently a resident of the State of Vermont.

3. In December of 2000 while both plaintiff and defendant were residents of Virginia they traveled to Vermont and obtained a civil union.

4. Both parties entered the civil union freely and voluntarily and did so to create a legal commitment to each other.

5. Both parties returned to Virginia as spouses.

6. The parties made a joint decision to employ artificial (alternative) insemination in order to have a child and to have a family.

7. This decision was jointly made and agreed

to by both parties while they were legally connected by the civil union.

8. The parties made a joint decision to have Lisa be the bearing mother.

9. Both parties participated in the selection process of an anonymous sperm donor through a sperm bank.

10. Both parties participated in the decision to have the sperm donor's physical characteristics resemble those of the non-bearing mother, Janet.

11. Lisa became pregnant through the use of the sperm bank procedure and gave birth to IMJ on April 16, 2002.

12. Janet was present for the entire delivery and cut the umbilical cord.

13. The child was born while both parties were united by civil union.

14. The artificial insemination took place in Virginia.

15. The child was delivered in Virginia.

16. The parties made a joint decision to relocate from Virginia to the State of Vermont to raise IMJ because of Vermont's Civil Union law and its rights, privileges and responsibilities. The decision to relocate was also due to the perceived

inhospitality of the Commonwealth of Virginia to a same-sex couple with a child.

17. The parties moved to Vermont in August of 2002.

18. Both parties resided in Vermont until they separated in September of 2003. At that time, Lisa moved back to Virginia.

19. Janet Miller-Jenkins is not a biological parent of IMJ.

20. Janet Miller-Jenkins did not adopt IMJ.

Discussion

As stated above, the relief sought by the plaintiff and the premise of her argument requires an examination of the law regarding parental status in Vermont. The premise of plaintiff's argument is that there are only two ways in which one can be a parent under Vermont law: a biological connection or adoption. That Janet does not have a biological connection to IMJ and that Janet did not adopt IMJ has never been disputed. FN 2

Under Vermont law, "parties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to

spouses in a marriage." 15 V.S.A. § 1204(a). "A party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law." Id. § 1204(b). "The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to the parties to a civil union." Id. § 1204(d). "The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." Id. § 1204(f). "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage...." Id. § 1206.

The clear instructions of the Vermont legislature is that this court may not treat parties to a civil union different from parties to a marriage. The court first addresses Lisa's argument that the court does not have jurisdiction to consider the issue of parentage because neither party has initiated a "parentage proceeding" in accordance with 15 V.S.A. §§ 301-308. This assertion ignores the procedural facts of this case. Lisa requested in her signed complaint for civil union dissolution that the court

determine the parental rights and responsibilities of the minor child, that the court award her sole physical and legal rights and responsibilities, that the court award Janet parent/child contact and that the court award child support. She also identified the child as a biological or adoptive child of the civil union.

Vermont's statute governing proceedings contains a statement that "a person alleged to be a parent shall be rebuttably presumed to be the natural parent of the child if ... the child is born while the husband and wife are legally married to each other." 15 V.S.A. § 308(4). The presumption that a child born while two people are married is the legitimate child of the marriage has a long tradition in the common law. See Godin v. Godin, 168 Vt. 514, 521 (1998) (noting the statutory presumption in 15 V.S.A. § 308(4) and discussing the origin of the presumption as one of the strongest and most pervasive of presumptions in the common law, citing In re Findlay, 170 N.E. 471, 472 (N.Y. 1930)). From the uncontested assertions in the complaint and answer, as well as the uncontroverted testimony that the child was born while the parties were united in a civil union, the law will presume that the parties to a civil union are the parents of that child, just as the court would so presume the parental status of a married couple initiating a divorce and custody action and acknowledging the child as being born during the marriage. To not recognize the presumption would violate the mandate of the civil

union law.

In the context of a child born to a marriage where at least one party requests the court to determine custody and support issues in conjunction with the divorce action, it is incumbent upon the party either denying his or her own status as a parent, or in attempting to deny the parental interest of the other spouse, to initiate that challenge. That is the benefit of the presumption. Thus, it is not necessary that there be a corresponding parentage action every time the court is asked to determine parental rights and responsibilities with regard to a child born of a marriage. When parentage is not challenged, the result is that the parentage is determined by the nature of the proceedings as a matter of law. See Godin, 168 Vt. at 521, fn 2. In such a case, the court need only determine that the child was born during the marriage.

Lisa argues that Lawrence v. Limoge, 149 Vt. 569, 572-73 (1988), stands for the proposition that this court lacks jurisdiction over the issue of parentage in this case. Lawrence involved an unmarried putative father seeking visitation rights based on the Uniform Child Custody Jurisdiction Act. The Court determined that the trial court lacked jurisdiction over the issue of parentage where the putative father brought the proceeding solely only the basis of the UCCJA, a statute intended to resolve jurisdictional disputes, and not under the Parentage Proceedings Act. Id. However, in this case, Janet is not simply a putative, or "alleged" parent, she is a

presumed parent by virtue of the civil union. The court declines to stretch the holding in Lawrence to adopt Lisa's position that the issue of parentage is not implicit in a custody or child support action between parties to a marriage or a civil union involving a child born during the marriage or civil union.

Lisa next argues that the presumption must be deemed inapplicable based on the facts of this case because it is undisputed that there is no biological connection between Janet and IMJ. This argument depends on a narrow interpretation of Vermont's statute on parentage proceedings. Under Lisa's interpretation, once she established that Janet has no biological connection to IMJ, has not adopted IMJ, and has not completed a "Voluntary Acknowledgment of Parentage form," FN 3 under 15 V.S.A. § 308 there can be no presumption of parentage. The court does not construe the statute to delineate the only ways in which one can be a parent under Vermont law, nor to dictate that the legal presumption can be defeated by genetics alone. See Godin, 168 Vt. at 522 ("Indeed, the presumption of paternity has assumed even greater significance today, as alternative methods of conception unrelated to the 'biology' of the presumed parent have become more common.").

Parties to a civil union who use artificial insemination to conceive a child can be treated no differently than a husband and wife who, unable to conceive a child biologically, choose to conceive a child by inseminating the wife with the sperm of an

anonymous donor. The issue of parental status of a child conceived through artificial insemination is one of first impression in Vermont. Under Lisa's interpretation of the law, because there is no established precedent in Vermont, the husband would no more than a mere stepparent and would be required to adopt the child so conceived in order to be considered a parent in the eyes of the law. This argument is without merit.

While Vermont has not yet been presented with the question of parental status concerning a child born during a marriage and conceived through artificial insemination, the issue is not a new one in the common and statutory law of other states. See M. Yaworsky, Annotation, Rights and Obligations Resulting From Human Artificial Insemination, 83 A.L.R. 4th 295, 301 (1991) ("Generally speaking, a husband who consents to the artificial insemination of his wife using sperm from a third-party donor is treated in law as the father of any Child born as a result of the insemination, for all purposes. Where this result is not dictated by statute it has been said to arise by reason of public policy or the principles of equitable or promissory estoppel."). In In re Adoption of Anonymous, 345 N.Y.S.2d 430 (N.Y. Surr. Ct. 1973), for example, a mother asserted that her former husband's consent was not required for her new husband to adopt the child born of the previous marriage on the basis that the former husband was not a parent of the child conceived through artificial insemination. The court disagreed and required the

former husband's consent, holding that a child born of artificial insemination of the mother by semen of anonymous third party donor with consent of her husband during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage, and that the husband is a lawful parent of the child. Id. At 435-36. See also People v. Sorensen, 437 P.2d 495, 498 (Cal. 1968) (holding that ex-husband, who consented during the marriage to artificial insemination of his wife with sperm of anonymous sperm donor, was the lawful father of the child thereby conceived and responsible for support of the child). The Sorensen court reasoned that when a child born of a marriage is conceived by an anonymous sperm donor, there is no "natural" father, and the court can only look for a "lawful" father. Id. at 498

> [A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport. One who consents to the production of a child cannot create a temporary relationship to be assumed and disclaimed at will, but the arrangement must be of such character as to impose

> an obligation of supporting those for whose existence he is directly responsible.

Id. at 499.

The court adopts the reasoning of other courts that have determined that where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology. As set forth in the facts above, both parties testified that they had the intent to create a family unit when they jointly agreed to the conception of IMJ.

While Lisa may be correct in her assertion that had Janet adopted IMJ this entire issue could have been averted, the question is not whether Janet could have adopted IMJ, but whether the law would require her to do so in order to protect her parental interest. As the legislative findings noted in Vermont's Civil Union Statute state:

> (7) The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.
>
> (8) Without the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples

> suffer numerous obstacles and hardships.
>
> (9) Despite longstanding social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for families together, just as do couples who are married under Vermont law.

Legislative Findings, 1999, No. 91 (Adj. Sess.) § 1 (eff. April 26, 2000). This court can not impose a hurdle for a party to a civil union that it would not impose on a married couple. The court sees no reason why a husband choosing to create a family with his wife by utilizing an anonymous sperm donor would be required under Vermont law to initiate an adoption proceeding to protect his rights, and the court can not impose this obstacle upon a party to a civil union who makes that same choice. FN 4

Finally, we reach the question of whether Attorney Lashman's representations that parentage was not an issue and that Lisa "waived" the issue should be set aside and the temporary order vacated. Pursuant to the foregoing analysis, even if this court determines that Lisa should retain the right to challenge Janet's status as a parent, she has not

demonstrated that there are any facts requiring judicial resolution that would or could destroy Janet's status as a lawful parent. FN5 The evidence presented at the hearing on this motion consisted of testimony of Lisa's and the various attorneys' understanding of the law, as opposed to any factual basis upon which to rebut the presumption of parentage. This court was justified in proceeding with a hearing already in progress on a temporary order to establish visitation based on the undisputed testimony in this case and the representations of both Lisa and her counsel that IMJ was a child of the civil union and that parentage was not an issue. Lisa has not raised any legal or factual argument that would lead this court to believe that if the issue of parentage were litigated prior to the temporary order that the outcome would be any different. The court is not persuaded that there is any legal or factual basis to vacate the temporary order granting visitation rights to Janet.

ORDER

Based upon the above this court must recognize a legal parental interest in both parties to this civil union. Parentage by Lisa and Janet was presumed by Vermont law when this matter was filed. Given her own representations and testimony, Lisa has failed to demonstrate that there is any basis for a factual hearing to rebut that presumption. Accordingly, this court will recognize a parental

interest in both Lisa and Janet. The temporary order remains in full force and this case is to be set for a final hearing on parental rights, property and child support. FN6

Dated at Rutland, Vermont, this 17th day of November, 2004.

s/William D. Cohen
Hon. William D. Cohen

Family Court Judge

FN1 The court will refer to the parties by their first names for ease of identification and will identify the minor child only by initials.

FN2 The court has previously denied plaintiff's motion to require Janet and IMJ to submit to genetic testing. It has never been disputed that Janet has no "genetic" connection to the child. Plaintiff's motion was simply an extension of her legal argument that Janet cannot be considered a parent without a genetic connection.

FN3 See 15 V.S.A. § 307 (describing a procedure for *unmarried* parents to acknowledge parentage by filing a Voluntary Acknowledgment of Parent form with the department of health).

FN4 It is noteworthy that Vermont law requires the consent of a husband, or a party to a civil union, to

any adoption of a child born during a marriage or civil union. See 15 V.S.A. § 2-401 (consent to adoption in Vermont requires consent by the woman who gave birth, the biological father, and "a man who is or has been married to the woman if the minor was born during the marriage"); 15 V.S.A. § 1204(b) (party to civil union included in any terms that denote the spousal relationship, as those terms are used throughout the law.)

FN5 It bears notation that some states have recognized parental and visitation rights of a same-sex partner on the basis that the non-biological partner was a "de facto" parent where the couple utilized artificial insemination to have a family. See, e.g., C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004). This court's decision is not based on Janet's status as a "de facto" parent, which, in jurisdictions that so recognize such status; typically focuses on the psychological and caretaking role that one has in the child's life. This court's analysis is based on Janet's status as a *legal* parent. See also Titchenal v. Dexter, 166 Vt. 373, 376 n.1 (1997) (distinguishing claims of "de facto" parent and "in loco parentis" as opposed to claim as a legal parent). This court's determination of parental status is based on Janet's role as a party to a civil union in the joint decision to conceive and raise the child during that union, not on her conduct subsequent to the child's birth.

FN6 As discussed in an earlier ruling in this case, the court is aware that Lisa initiated a parentage action in Virginia while the litigation initiated by her in this

court was still pending. See Order, Sept. 2, 2004, at 5-6. As discussed above, this court already had jurisdiction over the parentage issue and continues to have jurisdiction over this matter. The exercise of jurisdiction by the Virginia court is not in accordance with the Uniform Child Custody Jurisdiction Act, see 15 V.S.A. §§ 1301 et seq., Va. Code Ann. §§ 20-146.1 et seq. and the federal Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A(f). See Order, Sept. 2, 2004, at 5-6. Lisa has also recently filed an action seeking this court to recognize a final order issued by the Virginia court declaring her to be IMJ's sole legal parent and declaring Janet to have no claim of parentage or visitation rights over IMJ. That filing is waiting a response, and will be addressed at a separate time. However, the court notes the full, faith and credit requirement of the United States Constitution, U.S. Const. art. IV, § 1, only applies where the court issuing the judgment had jurisdiction to enter it. See Poston v. Poston, 160 Vt. 1, 5 (1993) (citing Williams v. North Carolina, 325 U.S. 226, 229 (1942)).

APPENDIX N

ARTICLE 4

UNITED STATES CONSTITUTION

Section 1

Article IV, Section 1 to the United States Constitution

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may be general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

APPENDIX O

ARTICLE I

BILL OF RIGHTS

Section 15-A. Marriage.

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

APPENDIX P

UNITED STATES CODE

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

APPENDIX Q

UNITED STATES CODE

28 U.S.C. § 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term -

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child

less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination

made by a court of a State is consistent with the provisions of this section only if -

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State

(i) is the home State of the child on the date of the commencement of the proceeding, or

(ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)

(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because

(I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such a State, and

(II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and

(i) the child has been abandoned, or

(ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D)

(i) it appears that no other State

would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and

(ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if–

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other Sate is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

APPENDIX R

UNITED STATES CODE

28 U.S.C. § 1738C. Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

APPENDIX S

CODE OF VIRGINIA

§ 20-45.3. Civil unions between persons of same sex

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

APPENDIX T

CODE OF VIRGINIA

§ 20-146.26.

§ 20-146.26 Registration of child custody determination.

A. A child custody determination issued by a court of another state may be registered in this Commonwealth, with or without a simultaneous request for enforcement, by sending to the appropriate juvenile and domestic relations district court in this Commonwealth:

1. A letter or other document requesting registration;

2. Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

3. Except as otherwise provided in ? 20-146.20, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

B. On receipt of the documents required by subsection A, the registering court shall:

1. Cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

2. Serve notice upon the persons named pursuant to subdivision A 3 and provide them with an opportunity to contest the registration in accordance with this section.

(1979, c. 229, ? 20-139; 2001, c. 305.)

APPENDIX U
CODE OF VIRGINIA
§ 20-146.27.

VA Code § 20-146.27 Enforcement of Registered Determination

A. A court of this Commonwealth may grant any relief normally available under the law of this Commonwealth to enforce a registered child custody determination made by a court of another state.

B. A court of this Commonwealth shall recognize and enforce, but may not modify, except in accordance with Article 2 (? 20-146.12 et seq.) of this chapter, a registered child custody determination of a court of another state.

(1979, c. 229, ? 20-138; 2001, c. 305.)

APPENDIX V

MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO REGISTER AND ENFORCE A FOREIGN VISITATION DETERMINATION.

(filed in Juvenile & Domestic Relations Court)

This case presents questions *not previously decided* by Virginia courts concerning the registration and enforcement of a foreign visitation determination arising out of the dissolution of a Vermont same-sex union treated as marriage. This court should refuse to register and enforce the November 7, 2008 Vermont order for three reasons. First, effective January 1, 2007, the Virginia Constitution prohibits registration of foreign custody and visitation orders that arise out of a same-sex civil union. Second, even if Virginia is required to *register* the Vermont order as a result of its full faith and credit obligation, it is not required to *enforce* the Vermont order. Finally, the full faith and credit obligation does not require Virginia to register or enforce unconstitutional orders.

BRIEF IN SUPPORT OF APPELLANT, LISA MILLER
(filed Circuit Court)

ARGUMENT

I. THE FULL FAITH AND CREDIT OBLIGATION DOES NOT OBLIGATE VIRGINIA TO REGISTER OR ENFORCE A FOREIGN CUSTODY ORDER ARISING OUT OF A SAME-SEX UNION TREATED AS MARRIAGE.

* * *

The obligation to give full faith and credit to a foreign order does not impose upon a sister state the obligation to *enforce* the order to any greater extent than the order would be enforced if rendered by a court in the state.

* * *

Although the *Baker* Court stated (we that there is no "roving public policy" exception to **the recognition** of out of state judgments under the Full Faith and Credit Clause of the United States Constitution, the Court explained that under the Full Faith and Credit Clause an order "gains nationwide force" for purposes of "claim and issue preclusion (res judicata)," but that

"does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law." *Id.* at 233, 234 235 (emphasis added) (citing *McElmoyle ex. rel. Bailey v. Cohen*, 38 U.S. 312, 325 (1839)).

* * *

II. THE FULL FAITH AND CREDIT OBLIGATION DOES NOT OBLIGATE VIRGINIA TO REGISTER AND ENFORCE A FOREIGN ORDER THAT UNCONSTITUTIONALLY GRANTS PARENTAGE RIGHTS TO A THIRD PARTY OVER THE OBJECTIONS OF THE CHILD'S SOLE, FIT, BIOLOGICAL PARENT.

This Court should refuse to register or enforce the Vermont Order because it is unconstitutional: it violates Ms. Miller's parental and due process rights.

* * *

In fact, no constitutional analysis whatsoever was performed prior to declaring Ms. Jenkins, a legal stranger to the child, to be a parent. As such, the custody and visitation orders, which rest on the unconstitutional parentage determination, fail to afford Ms. Miller a constitutionally guaranteed minimum of process due before a third party can be declared a parent to her child.

* * *

The full faith and credit obligation cannot be interpreted to require a state to register and enforce an unconstitutional order from a sister state as if it were a valid order.

* * *

Separately, the Vermont Order cannot be enforced because it is based on a retroactive application of a new parentage rule created by the Vermont judiciary, which infringes Ms. Miller's due process guarantees.

BRIEF OF APPELANT LISA MILLER

(filed Virginia Court of Appeals)

QUESTIONS PRESENTED

1. Whether the full faith and credit obligation requires Virginia to *enforce* a foreign order arising out of a same-sex union treated as marriage when the Virginia Code and Constitution declare such orders void and unenforceable. (App. 126; Feb. 26, 2009 Opening Brief of Appellant at 6-10).

2. Whether the full faith and credit obligation requires Virginia to register or *enforce* a foreign custody order arising out of a same-sex union treated as marriage when the Virginia Constitution prohibits recognition of a same-sex union to which is assigned the rights, benefits, obligations, qualities, or effects of marriage. (App. 126; Feb. 26, 2009 Opening Brief of Appellant at 11-18).

3. Whether the full faith and credit obligation requires Virginia to register and *enforce* a foreign order that unconstitutionally grants parentage rights to a same-sex third party over the objections of the child's fit, biological parent. (Feb. 26, 2009 Opening Brief of Appellant at 17-19).

* * *

The Vermont order is patently unconstitutional in at least two respects, each of which is an independent reason for Virginia to refuse enforcement. The Vermont order (i) unconstitutionally infringes Lisa's parental rights and (ii) violates the federal due process guarantees by retroactively applying a new parentage rule that strips Lisa of her sole parental rights over her child.

* * *

The Vermont parentage determination, however, on its face, fails to give any special weight whatsoever to Lisa's preference as the sole, biological parent. In fact, *no constitutional analysis whatsoever was performed* prior to declaring Janet, a legal stranger to the child, to be a parent. As such, the custody and

visitation orders, which rest on the unconstitutional parentage determination, fail to afford Lisa a constitutionally guaranteed minimum of process due before a third party can be declared a parent to her child.

PETITION FOR APPEAL

(filed in Virginia Supreme Court)

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in concluding that the federal Parental Kidnapping Prevention Act (PKPA) requires Virginia to enforce, as distinct from register, a Vermont order granting visitation and parental rights to a woman with no biological or adoptive relationship to a child because she was in a civil union with the biological mother at the time the child was conceived in Virginia and born in Virginia.
2. The Court of Appeals erred in concluding that the prior litigation concerning jurisdiction and registration issues was law of the case as to the question of first impression in this case, in the Commonwealth, and in the country concerning enforcement of the foreign custody order.
3. The Court of Appeals erred in concluding that the prior litigation concerning jurisdiction and

registration decided the issue of whether the Vermont order must be enforced despite the time, manner, and mechanism exception to the Full Faith and Credit Clause recognized in *Baker v. General Motors Corp.*, 522 U.S. 222 (1998).

4. The Court of Appeals erred in failing to address Ms. Miller's argument that Virginia cannot enforce a Vermont order that did not afford the fit biological parent the constitutionally guaranteed minimum process due before treating a third party as a parent to the child for purposes of visitation and custody.

5. The Court of Appeals erred in failing to address Ms. Miller's argument that Virginia cannot enforce a Vermont order the retroactively deprives a fit, biological parent of fundamental parental rights.

6. The Court of Appeals erred in directing Virginia to enforce the Vermont custody order granting visitation and parental rights to a woman with no biological or adoptive relationship to the child because she was in a civil union with the biological mother at the time the child was conceived in Virginia and born in Virginia because enforcement is neither required under the Full Faith and Credit Clause of the United States Constitution nor permitted under the Virginia Code and Constitution.

7. The Court of Appeals erred in failing to

address Ms. Miller's argument that Virginia cannot enforce a Vermont order that would violate Ms. Miller's guarantee of equal protection under the law insofar as similarly situated biological parents are treated differently under Virginia law.

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(2)

No. 10-177

Supreme Court, U.S.
FILED
OCT 7 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LISA MILLER,

Petitioner,

—v.—

JANET JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Whether any federal issue is presented for review by this Court when the Virginia courts have repeatedly held the issues raised in the Petition to be barred by the law of the case doctrine.

2. Assuming the issue to be properly preserved, whether the States are bound by the Parental Kidnapping Prevention Act's mandate that they "shall enforce" the custody and visitation determinations of other States.

3. Whether the Court should grant review when the Petitioner's action of holding herself and the parties' child in hiding away from the authorities prevents this Court from enforcing any orders it may issue.

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INTRODUCTION

This is the ***fifth*** petition for *certiorari* that counsel for Petitioner Lisa Miller ("Petitioner" or "Lisa") has filed in this litigation, a custody dispute that was decided definitively almost four years ago when Petitioner failed to properly appeal from the Virginia Court of Appeals decision in *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006) (App. 52a) (hereafter, *Miller-Jenkins I*).[1] In that opinion, the Virginia Court of Appeals held that: (1) under the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, Vermont, not Virginia, has jurisdiction over this dispute; (2) any Virginia laws purporting to deny recognition to out-of-state custody and visitation orders between same-sex couples are preempted by the PKPA; (3) the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C, does not modify Virginia's obligations under the PKPA; and (4) Virginia courts must give full faith and credit to Vermont's rulings in this case. App. 60a-70a.

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[1] For ease of reference, Respondent Janet Jenkins ("Respondent" or "Janet") refers to the other major decisions below as follows: *Miller-Jenkins II* is the opinion of the Virginia Supreme Court on appeal from a Virginia Court of Appeals decision subsequent *to Miller-Jenkins I* requiring registration of orders issued in the Vermont custody case initiated by Petitioner. In *Miller Jenkins II*, the Virginia Supreme Court held that the law of the case doctrine barred Petitioner from re-litigating any of the issues raised in *Miller-Jenkins I* (App. 26a). *Miller-Jenkins III* is the February 23, 2010 Virginia Court of Appeals opinion appealed from in this case, in which that court held that the law of the case doctrine barred further consideration of whether Virginia courts should enforce Vermont orders relating to the custody dispute between Petitioner and Respondent (App. 5a).

As noted above, Petitioner failed to properly appeal *Miller-Jenkins I*, and subsequent Virginia Court of Appeals and Virginia Supreme Court decisions have made clear that she has forfeited her right to argue these and other issues that were decided in that appeal. Nonetheless, Petitioner has spent the past four years trying to get the Virginia courts and this Court to reconsider those issues. In the meantime, she consistently has flouted court orders and repeatedly has been held in contempt in both Vermont and Virginia. After the Vermont court ordered a change of custody from the Petitioner to the Respondent, Petitioner defied the order and absconded with the parties' daughter. She has not been heard from since, raising serious questions about the legitimatcy of the petition purportedly filed on her behalf. More fundamentally, her flight and secreting of herself and the parties' daughter would disentitle her to review by this Court, even if this Court had jurisdiction over this appeal and it satisfied this Court's standards for certiorari – neither of which is the case.

JURISDICTIONAL STATEMENT

Petitioner states that the Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), a provision that requires the assertion of a federal question. Because the case was decided below based on the law of the case, a state law doctrine, there is no federal question, and this Court does not have jurisdiction.

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains the following omissions and mischaracterizations:[2]

1. When Petitioner initiated this litigation in Vermont in 2003 by filing a petition to dissolve her and Respondent's civil union, Petitioner not only "listed" the couple's child, Isabella (also referred to as "IMJ"), as a child of the civil union (Pet. at 4), but also "requested that the court award her custodial rights and award Janet [Respondent] parent-child contact" (App. 83a), thus expressly invoking the Vermont court's jurisdiction to resolve the parties' custody and visitation issues.

2. Lisa neglects to mention that the Vermont family court's conclusion that Janet is Isabella's legal parent was affirmed by the Vermont Supreme Court based on "many factors," including not only the parties' civil union but also because: "It was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent." *Miller-*

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[2] The legal arguments included in Petitioner's Statement of the Case (Pet. at 2-3), are addressed in the Reasons for Denying the Writ, below.

Jenkins v. Miller-Jenkins, 912 A.2d 951, 956 (Vt. 2006) (App. 114a-115a).

3. In deciding that the Parental Kidnapping Prevention Act (PKPA) deprived Virginia of jurisdiction over the dispute, the *Miller-Jenkins I* court carefully analyzed the interaction between the PKPA and the Defense of Marriage Act (DOMA) and concluded that "[n]othing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations." App. 68a. The opinion further instructed the trial court "to extend full faith and credit to the custody and visitation orders of the Vermont court." App. 70a.

4. Lisa's attempt to appeal *Miller-Jenkins I* to the Virginia Supreme Court was dismissed because she failed to file a notice of appeal. App. 30a. Lisa sought a writ of *certiorari* from this Court, which was denied. *Miller-Jenkins v. Miller-Jenkins*, 128 S. Ct. 1127 (2008).

5. Petitioner asserts that, in the appeal that is the subject of this petition for certiorari, the Virginia Court of Appeals held that "the law of the case doctrine prevented it from deciding the enforcement issue even though the enforcement question was indisputably *not* part of the prior litigation because Janet specifically chose *not* to litigate the enforcement issue in prior litigation." Pet. at 7 (emphasis in original). The *Miller-Jenkins III* decision from which Petitioner appeals flatly rejected that argument, however, pointing out that Petitioner's initial July 2004 filing asked the Virginia courts "to find that the parental rights afforded to

[Janet] by the Vermont court were 'nugatory, void, illegal and *unenforceable*." App. 17a (emphasis supplied by court).

6. Petitioner asserts that "no court addressed Lisa's constitutional arguments" regarding the Vermont orders. (Pet. at 8.) In fact, the courts below have held her to have waived those arguments. App. 35a, 118a.

7. While *Miller-Jenkins III* was pending, the Vermont Court ordered that custody of IMJ be transferred from Miller to Jenkins on January 1, 2010. Miller did not appear for the custody transfer. Jenkins has been unable to contact Miller or IMJ since, and their whereabouts are unknown.[3]

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[3] If the Court so requests, counsel can produce a certified copy of the Vermont Court's December 22, 2009 Order, finding that "it was represented to the court that no one has had any contact with Lisa Miller or IMJ since the court's order of November 20th. Her attorneys have attempted to contact her, but she has not returned any messages. The present whereabouts of Lisa Miller and IMJ are unknown" and that "it appears that Ms. Miller has ceased contact with her attorneys and disappeared with the minor child who is the subject of the parental rights and responsibilities order."

REASONS FOR DENYING THE WRIT

I. BECAUSE THE DECISION BELOW RESTED ON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND, THE WRIT SHOULD BE DENIED.

As both the Virginia Supreme Court and Court of Appeals have held, Petitioner is bound by the decision of the Virginia Court of Appeals in *Miller-Jenkins I* that the PKPA, not DOMA, controls this dispute, and thus Virginia courts' only role in this litigation is to afford full faith and credit to orders of the Vermont Court. App. 19a, 35a. From 2004 to 2006, Petitioner argued that the PKPA effectively was trumped by the Defense of Marriage Act. *See* App. 66a-68a. In November 2006, the Virginia Court of Appeals emphatically rejected that argument: "Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA. . . . [T]he only question before us is whether, considering the PKPA, Virginia *can deny full faith and credit* to the orders of the Vermont court regarding IMJ's custody and visitation. *It cannot.*" App. 68a-69a (emphasis added).

Lisa "failed to perfect an appeal from that decision in the manner required by law," and the Court of Appeals decision became final. *Miller-Jenkins II*, App. 37a (Hassell, J., concurring); 30a. The Virginia courts consistently have refused to allow Petitioner to re-litigate the issue of the Virginia court's duty to afford full faith and credit to orders of the Vermont Court.

A. This Court Does Not Have Jurisdiction to Review Cases Decided by State Courts on State Grounds.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). Review is precluded "whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). *Coleman* reflected this Court's longstanding respect for the right of each state court to "prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy. . . ." *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) (citing cases).

"In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman*, 501 U.S. at 729. The doctrine is based in the limitation of the Court's jurisdiction to cases and controversies: "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126. That is precisely what would happen should this Court review the present case. Lisa's failure to appeal *Miller-Jenkins I* properly rendered that decision final. While this Court theoretically could determine

that *Miller-Jenkins I* was incorrectly decided, the law of the case ruling in *Miller-Jenkins II* holds that "[r]ight or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either." App. 32a (citation omitted). Nothing this Court could say about the federal law would change the judgment of the Virginia courts from which Petitioner seeks review.

B. Law of the Case is an "Adequate and Independent State Ground."

This Court has held that a ruling in a final judgment deemed "law of the case" is an independent and adequate state ground precluding review. *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44 (1915), illustrates the point. In the first appeal in that case, the state supreme court directed the trial court to enter a judgment awarding the plaintiff a right of way over disputed land. The trial court did so, but the plaintiff appealed again, insisting that it was entitled to a fee simple. 239 U.S. at 46. The state supreme court rejected this argument based on the law of the case doctrine because the plaintiff had failed to seek rehearing from that court's prior final judgment defining the extent of his property rights. *Id.* This Court refused to accept the case for review. "Manifestly the first judgment was final," in that it "disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court." *Id.* at 47. "And as the question sought to be presented arises upon the first judgment . . ., it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here." *Id.*

The present case is no different from *Rio Grande Railway*. As the Virginia courts have held, and as Petitioner's prior conduct in trying (but failing properly) to appeal *Miller-Jenkins I* and thereafter seeking certiorari regarding that ruling acknowledges, *Miller-Jenkins I* was a final judgment, and thus Petitioner's procedural default is binding and precludes this Court's review. *See* App. 32a.

The cases Petitioner cites are not to the contrary but merely provide that a litigant who suffers an adverse ruling that cannot be appealed to this Court can secure review of that ruling once the case is final and eligible for certiorari.[1] For example, *Washington ex rel Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917), involved a condemnation action in which the defendant took an interlocutory appeal to the state supreme court to challenge the constitutionality of the state statute. The state supreme court upheld the statute, and remanded to the trial court for further proceedings. This Court refused to accept the case for review because the state court judgment was not final, but noted that "[w]hen the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter."

[1] Other cases cited by Petitioner came to this Court from *federal* courts of appeal. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990); *Christianson v. Colt Indus.*, 486 U.S. 800 (1988); *Messinger v. Anderson*, 225 U.S. 436 (1912). Those cases obviously have no bearing on whether a ruling based on law of the case represents an adequate and independent *state* ground barring review from a *state* court judgment.

243 U.S. at 256-57. Similarly, in the other two cases cited in the Petition, the ruling claimed to be "law of the case" was contained in a non-final decision, specifically a decision by the state supreme court that remanded the case back for trial. *See Reece v. Georgia*, 350 U.S. 85 (1955); *Davis v. O'Hara*, 266 U.S. 314 (1924). Thus, for each of those rulings, review did not lie in this Court, there thus was no procedural default, and this Court logically decided that, "[b]ecause we cannot review a state court judgment until it is final, a contrary rule would insulate interlocutory state court rulings on important federal questions from our consideration." *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982). But this factor does not arise in cases, like *Rio Grande Railway* and the present case, in which a party attempts to re-litigate an adverse ruling that could have been appealed to this Court.

C. Lisa's Contention That the Virginia Supreme Court's Law of the Case Doctrine Is Not an Adequate State Ground Because It Is Not "Strictly or Regularly Followed" Is Without Merit.

Petitioner argues that the Virginia Supreme Court's ruling in *Miller-Jenkins II* was too novel to constitute an adequate state procedural ground, because the law of the case principle was not 'strictly or regularly followed.'" Pet. at 36, citing *Hathorn*, 457 U.S. at 263. But the law of the case doctrine was firmly established in the Virginia courts over a century before *Miller-Jenkins II*. *See Chappell v. White*, 36 S.E.2d 524, 527 (Va. 1946) ("The [law of

the case] doctrine has been applied in many cases by this court."); *Searles' Adm'r v. Gordon's Adm'r*, 157 S.E. 759, 761 (Va. 1931) ("The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation."); *Norfolk & W. Ry. Co. v. Duke & Rudacille*, 60 S.E. 96, 97 (1908) (describing the doctrine as "well settled").

Nor is there anything novel about the way the doctrine was applied in this case. The Virginia Supreme Court explained that "[p]ursuant to the 'law of the case' doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that decision during later stages of the 'same *litigation*.'" App. 33a (emphasis added) (*quoting Kondaurov v. Kerdasha*, 629 S.E.2d 181, 188 (Va. 2006). Regarding Lisa's contention that the second appeal was not part of the same "case" as the first one, the court explained:

> Although Lisa and Janet separately filed the cases from which the two appeals arose, both cases involved these same parties and sought adjudication of the same issue, custody and visitation regarding IMJ. The two Virginia appeals were part of the "same litigation" seeking to resolve the single question which custody order, the Vermont custody order or the circuit court's order, would govern the parties' custody and visitation dispute.

App. 36a. *See* Va. Code § 20-146.26. Petitioner "has failed to substantiate any claim that the [Virginia] courts in general apply this [rule] in an irregular, arbitrary, or inconsistent manner." *See Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 399 (1990).[5]

Petitioner also argues that enforcement was not an issue in *Miller-Jenkins I*, which is both factually incorrect and legally irrelevant. In June 2004, the Vermont Court issued an order for Respondent to have visitation with her child. As the *Miller-Jenkins III* decision below pointedly noted, a few weeks later came "the petition that led to the decision in *Miller-Jenkins I*, which appellant herself filed with the Frederick County court to start the Virginia litigation between these parties, specifically ask[ing] the court to find that the parental rights afforded to [Respondent] by the Vermont court were "'nugatory, void, illegal and/or *unenforceable*.'" App. 17a (emphasis supplied by court) (quoting *Miller-*

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[5] Even if the "law of the case" doctrine did not apply, Petitioner would still be bound by rulings in "separately captioned" prior cases by the well-established doctrine of res judicata. *See Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493, 495 (Va. 1998) (holding second case barred by res judicata; "A valid, personal judgment on the merits ... bars re-litigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies."); *see also Bill Greever Corp. v. Tazewell Nat. Bank*, 504 S.E.2d 854, 856-57 (Va. 1998); *see generally Steinman v. Clinchfield Coal Corp.*, 93 S.E. 684, 687(Va. 1917) (the law of the case doctrine is "[c]losely akin to the doctrine of res judicata" and "it is at times confused with" res judicata).

Jenkins I at App. 55a). The circuit court order on appeal in *Miller-Jenkins I* ruled that that Petitioner "solely has the legal rights, privileges, duties and obligations as parent hereby established for the health, safety, and welfare of IMJ, and [] that neither Janet 'nor any other person has any claims of parentage or visitation rights over'" their child. App. 52a-53a. In her appeal of that order, Respondent included in the Questions Presented "Did the Virginia Court err in refusing to enforce the June 17, 2004 custody order of the Vermont Court . . ." and included an entire argument section devoted to that issue. Respondent also asked the Court of Appeals four times in her Opening Brief to "remand with instructions . . . to enforce . . . [the] orders and decrees of the Vermont Court." The Court of Appeals recognized that, where another state is properly exercising jurisdiction, the PKPA limits a second state's role to enforcing the first state's orders. App. 70a. The Court of Appeals thus ordered the circuit court to afford full faith and credit to Vermont's orders. *Id.*

On appeal in *Miller-Jenkins II* was the decision that Virginia must register orders from Vermont. The Virginia Supreme Court rejected the same argument Petitioner tries again here, *viz.*, that *Miller-Jenkins I* does not address the affirmative obligations imposed on Virginia courts with respect to Vermont orders. App. 31a-32a. In mandating that Virginia must register Vermont orders, *Miller-Jenkins II*'s recognized that *Miller-Jenkins I*'s PKPA holding resolved not only the issue of Virginia's obligation under the PKPA to "not exercise

jurisdiction" in conflict with Vermont (App. 157a, 28 USC 1738A(g)) but also its obligation under the PKPA to "enforce according to its terms" orders from Vermont (App.152a, 28 USC 1738A(a)). The Virginia Supreme Court pointed out the fallacy of Lisa's contention that *Miller-Jenkins I* was limited solely to the issue of jurisdiction by pointing out that "Lisa's petition and brief filed in this Court contain the identical assignments of error that she presented in her petition to this Court in the first Virginia appeal," and concluded that "each of the issues Lisa raises in this appeal was addressed and resolved in the first Virginia appeal." App. 35a.

Moreover, under Virginia's "law of the case" doctrine, litigants are barred from raising arguments in subsequent proceedings, "whether actually adjudicated or not," *Norfolk & Western Railway Co.*, 60 S.E. at 97, that are necessarily inconsistent with prior legal rulings in the same litigation. Thus, even if Lisa were correct that *Miller-Jenkins I* decided only a jurisdictional question, that decision's mandate that Virginia court's give full faith and credit to Vermont orders precludes her from now denying Virginia's enforcement obligations.

It bears emphasis that Petitioner had a more than adequate chance to seek review of these issues before this Court. Had she simply filed a notice of appeal from the Court of Appeals decision in *Miller-Jenkins I*, the Virginia Supreme Court and this Court could have ruled on the application of the PKPA and DOMA to this case. Because she failed to do so, Virginia appropriately has invoked its rules to deny her a second bite at the apple by spuriously

attempting to re-litigate those issues. As the Virginia Supreme Court aptly observed many years ago: "Every litigant should have opportunity to present whatever grievance he may have to a court of competent jurisdiction; but having enjoyed that opportunity, and having failed to avail himself of it, he must accept the consequences. 'It is to the interest of the republic that there should be an end to controversy.'" *Searles' Adm'r*, 157 S.E. at 761.

II. PETITIONER'S ARGUMENT THAT CONGRESS CANNOT MANDATE ENFORCEMENT OF FOREIGN ORDERS IN THE PKPA IS PROCEDURALLY IMPROPER AND SUBSTANTIVELY FRIVOLOUS.

Petitioner has changed her argument about the operation of the PKPA and Full Faith and Credit Clause radically in a futile attempt to avoid the preclusive effect of her procedural default. She previously acknowledged that the PKPA mandates enforcement of sister state orders without regard to the forum's public policy, and argued that DOMA made an exception to that rule to permit the forum to disregard orders emanating from litigation involving marriages and civil unions entered by same-sex couples.[6] Now she argues that the Full Faith and

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[6] *See Miller-Jenkins v. Miller-Jenkins*, No. 2654-04-4,Br.of Resp't, Virginia Court of Appeals, Jan. 3, 2005, at 27 ("The PKPA clarifies that a custody or visitation order is encompassed within those judgments or acts that must be afforded full faith and credit, and that *a state cannot refuse to enforce the order, regardless of that state's public policy*, if the first state properly exercised jurisdiction; and DOMA further clarifies that no State

Credit Clause has no enforcement mandate, and indeed that Congress is constitutionally prohibited from requiring enforcement of orders from sister states. This change of position does not avail Petitioner: *Miller-Jenkins I*'s reversal of an order denying Respondent her visitation rights and its instruction to the lower courts to afford full and credit to Vermont orders is a ruling that is binding under the "law of the case" doctrine. It cannot be changed -- at least between these litigants –whatever creative argument Petitioner might assert. Petitioner's newly-invented argument is also demonstrably wrong, as demonstrated by numerous Full Faith and Credit Clause holdings of this Court and by every known holding interpreting the PKPA. There thus is no reason for this Court to grant certiorari.

A. Petitioner Cannot Avoid the Law of the Case Doctrine By Proffering a Different Argument Against *Miller-Jenkins I*'s Mandate to Afford Full Faith and Credit to Orders of the Vermont Court.

Petitioner cannot avoid the application of the "law of the case" doctrine simply by changing her argument about why full faith and credit should not be afforded orders from Vermont. The Virginia Supreme Court held that "the issues *actually decided* in the first Virginia appeal[] include[d] the issues whether the PKPA applied to the custody and

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will be required to give full faith and credit to rights created in another state by virtue of a same-sex union.") (emphasis added).

visitation dispute and *whether the Vermont custody order was entitled to full faith and credit.*" App. 35a (emphasis added). This is not surprising, given the parties' arguments in *Miller-Jenkins I* and the fact that the circuit court order under review specifically held Respondent to have no visitation rights in Virginia. App. 52a-53a. Virginia plainly does not allow one to escape the preclusive effect of a prior legal ruling by raising new arguments against the validity of that ruling. The decision in *Miller-Jenkins I* to reverse the circuit court's order denying respect for Respondent's visitation rights and remand with instructions to afford full faith and credit to Vermont orders is the law of the case, and Petitioner cannot challenge that ruling by changing her arguments. App. 35a.

B. Petitioner's Argument That Congress Lacks Constitutional Authority to Mandate Enforcement of Sister State Orders Is Frivolous.

The PKPA could not be more clear: a "State *shall enforce* according to its terms" any prior custody or visitation determination by another state made consistently with the act. 152a. Petitioner seeks to avoid this pellucid statutory language by arguing that "Congress lacks constitutional authority to mandate enforcement of foreign orders." Pet. at 22. Her modest proposal would eviscerate the Full Faith and Credit Clause, which this Court described as "a nationally unifying force . . . making each an integral part of a single nation, in which rights judicially established in any part are given nation-

wide application." *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

Petitioner suggests that states discharge their Full Faith and Credit obligations by affording *res judicata* effect to a sister state's order even while emasculating the order by denying it enforcement. This Court's holdings belie this argument, as states have been required to enforce foreign judgments, not merely forbid re-litigation of them: In *Fauntleroy v. Lum*, 210 U.S 230, 237 (1908), Mr. Lum was not merely barred from relitigating his gambling debt; he had to pay Mr. Fauntleroy the amount of the judgment reflecting that debt that Mr. Fauntleroy had obtained in another state. And in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935), an Illinois court had to enforce the tax debt its hometown company owed as a result of a Wisconsin judgment, not merely preclude relitigation.

Petitioner fares no better in trying to limit the enforcement obligation by citing public policy concerns or the need to utilize the enforcement mechanisms of the forum. See Pet. at 18-21.[7] First,

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[7] This Court appears to have rejected older cases cited by Petitioner suggesting exceptions to the absolute mandate of enforcement in the Full Faith and Credit Clause. *Williams v. North Carolina*, 317 U.S. 287, 294 n.5 (1942), citing *Olmsted v. Olmsted*, 216 U.S. 386 (1910), *Fall v. Eastin*, 215 U.S. 1 (1909), and *Hood v. McGhee*, 237 U.S. 611 (1915). *See* Pet. at 18, 21. At a minimum, *Williams* held that any latitude those cases allowed a state in refusing to honor a sister state decree is limited to real estate under "the doctrine that the state where the land is located is 'sole mistress' of its rules of real property." 317 U.S. at 294 n.5.

there is no public policy exception to the Full Faith and Credit Clause's mandate to enforce judgments of sister states. *Baker v. General Motors*, 522 U.S. 222, 233 (1998). The Clause's "constitutional command requires a state to enforce a judgment of a sister state, . . . although the suit in which the judgment was obtained could not have been maintained under the laws and policy of the forum to which the judgment is brought." *Magnolia*, 320 U.S. at 439; *see also Milwaukee*, 296 U.S. at 276-77 ("The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, *each free to ignore obligations created . . . by the judicial proceedings of the others*") (emphasis added). Enforcement of sister state judgments is required irrespective of any conflicting public policy of the forum. *Baker*, 522 U.S. at 233 ("Regarding judgments, however, the full faith and credit obligation is exacting. . . . our decisions support no roving 'public policy exception' to the full faith and credit due judgments."); *Coghill v. Boardwalk Regency Corp.*, 396 S.E.2d 838, 839 (Va. 1990) (Full Faith and Credit Clause mandated enforcement of a New Jersey judgment for money based on a gambling debt, even though "[t]he public policy of Virginia with respect to the legal enforcement of gambling debts could scarcely be more forcefully expressed.").[8]

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[8] Petitioner argues that the deference in federal law for state control of domestic relations militates against compelling respect for interstate decrees. See Pet. at 19. This Court has rejected that argument previously. In both *Williams*, and *Sherrer v. Sherrer*, 334 U.S. 343 (1948), this Court spoke

Petitioner also misconstrues language in *Baker* that, while full faith and credit must be given to another state's judgment, the "time, manner, and mechanisms" of enforcing judgments in the forum state may differ. 522 U.S. at 235. Here, no one is asking the courts in Virginia to use the Vermont procedures for enforcement; instead, Janet invoked Virginia's procedures for enforcement, including the parts of the enforcement chapter of Virginia's UCCJEA providing for registration of orders and the enforcement of registered orders. *See* Va. Code §§ 20-146.26, 146.27.

Petitioner is arguing that the Vermont orders cannot be enforced in Virginia because of a substantive disagreement with the rationale employed by Vermont in deciding to issue those orders, not because of some time, manner and mechanisms for enforcement of judgments. But the conclusion that procedural methods for enforcement do not travel with the judgment "surely does not permit a State to refuse to honor a sister state judgment based on the forum's choice of law or policy preferences." *Baker*, 522 U.S. at 239. Instead, enforcement of judgments must be "even-handed" and not differ based on the forum state's policy

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eloquently about the importance of state control of marriage and family law, yet each time noted that these cases by definition present the conflicting views of two states regarding domestic issues, and that the solution is the exacting adherence to the procedural approach of the Full Faith and Credit Clause rather than the "to weigh the relative merits of the policies of" the two states. *Id.* at 354; *see also Williams*, 317 U.S. at 302.

preferences. *Id.* at 235, 239.[9] Allowing Petitioner to attack the Vermont order's substantive validity under Virginia law would be the exact equivalent of NOT giving full faith and credit to the Vermont order itself.

The flaw in Petitioner's logic is encapsulated by the facile argument that "Virginia has no mechanism for enforcing custody determinations founded upon parental rights arising from a same-sex union." Pet. at 19.[10] The visitation order at issue in this appeal merely provides for dates, times, logistics, and expenses for visitation – like hundreds of sister state orders regarding parental rights that Virginia has enforced previously pursuant to a statutory procedure. *See* Va. Code Ann. § 20-146.27(B). Petitioner wants Virginia courts "to go behind judgments recovered in other states" to re-examine the substantive underpinnings that led the court to its decision – the exact approach deemed "void" in *Fauntleroy*, 210 U.S. at 236; *accord Coghill*,

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[9] Courts have cited the "even handed" enforcement language of *Baker* in holding that a forum state's law providing for recognition of adoptions and/or revised birth certificates for adoptive families must be available for out-of-state final adoption judgments that are contrary to the forum's public policy. *Finstuen v. Crutcher*, 496 F.3d 1139, 1154 (10th Cir. 2007); *Giancaspro v. Congleton*, No. 2070086, 2009 Mich. App. LEXIS 765, **5-6 (Mich. Ct. App. Feb. 19, 2009).

[10] Notably, the Virginia UCCJEA speaks only about registration and enforcement of the "child custody determination" and sets no qualifiers regarding who may seek to register or enforce such a determination. *See* Va. Code §§ 20-146.24-20-146.26; 20-146.27(A); 20-146.27(B).

396 S.E.2d at 840 ("We have only the foreign judgment before us, not the underlying [gambling] transaction on which it was based."); App.23a-24a ("It does not matter to us . . . why the Vermont judge made his decision. The essence of full faith and credit, and the policy behind the PKPA and UCCJEA, is that we do not look behind orders validly entered in another state to the basis of their decision."). Similarly, the PKPA mandates enforcement of a sister state's custody and visitation provisions and precludes reexamining the sister state's reasoning. App. 152a.

Petitioner's purported distinction between res judicata and enforcement becomes even more puzzling with her embrace of the Tenth Circuit's decision in *Finstuen v. Crutcher*, when that decision completely undermines her position. Petitioner argues that *Finstuen* merely struck down Oklahoma's non-recognition law, and that the case had nothing to do with enforcing the out-of-state adoption. Petition at 20.[11] But the *Finstuen* court

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[11] Petitioner's quote from *Finstuen* that "The Doels do not seek to enforce their adoption order" is incomplete and misleading. Petition at 20. The court actually stated "The Doels do not seek to enforce their adoption order against Dr. Crutcher in his official capacity for the state of Oklahoma as a matter of claim or issue preclusion" in response to the state department of health's argument – deemed "absurd[]" by the court – that the department was not bound by the foreign adoption order because its director was not a party to that proceeding. *Finstuen*, 496 F.3d at 1195. Indeed, this highlights the fallacy of Petitioner's argument that the Full Faith and Credit Clause is limited to *res judicata* effect, as a judgment holder in one state can invoke the enforcement mechanisms of a sister state irrespective of whether the sister state had any role in the first

also ordered the registrar to enforce the out-of-state adoption by issuing a new birth certificate for "Baby E" listing both of her adoptive mothers as parents. 496 F.3d at 1154-55. *Finstuen* held that Oklahoma, having voluntarily created an enforcement mechanism for adoptive parents to secure new birth certificates, could not pick and choose which adoptive parents could utilize that mechanism:

> If Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children, the Doels could not invoke the Full Faith and Credit Clause in asking Oklahoma for a new birth certificate. However, Oklahoma has such a statute-*i.e.*, it already has the necessary "mechanism [ ] for enforcing [adoption] judgments." *See id.* [*Baker*, 522 U.S. at 235]. The Doels merely ask Oklahoma to apply its own law to "enforce" their adoption order in an "even-handed" manner. *See id.*

Finstuen, 496 F.3d at 1154. Similarly, Respondent seeks only to utilize Virginia's statutory procedure for registration and enforcement of foreign orders. Put another way, the Doels are adoptive parents, not same-sex adoptive parents; William Fauntleroy held a money judgment, not an illicit gambling debt; Janet Jenkins is, by court decree, a parent entitled to

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state's proceedings. *Id.*; *Fauntleroy*, 210 U.S. at 237; *Milwaukee*, 296 U.S. at 276-77.

visitation, not a former same-sex partner with no legal relationship to her child.

C. State Courts Have Adhered to the PKPA's Requirements With Remarkable Unanimity, Including Vermont and Virginia in this Litigation, Providing No Compelling Reason To Grant Certiorari.

Petitioner's argument that Congress lacked the power to mandate that states "enforce according to its terms and [] not modify" the custody orders of sister states is not only wrong but universally recognized as wrong. Petitioner concedes that there is no conflict in the law justifying this Court's review but seeks it because, according to Petitioner, this is an "important, recurring, question of federal law that needs to be settled." Pet. at 11 n.2. But the law is settled. In this litigation, the courts of both Vermont and Virginia refused to accept Petitioner's assertion that DOMA affects the applicability of the PKPA. App. 66a-68a, 96a. *Miller-Jenkins I*'s ruling that, in passing DOMA, Congress did not intend to allow states to undermine the PKPA's deterrents to child snatching and forum shopping, is consistent with the dozens of courts that have recognized that the PKPA preempts conflicting state law,[2] and specifically the

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[2] *See, e.g.*, *Meade v. Meade*, 812 F.2d 1473, 1476 (4th Cir. 1987); *Esser v. Roach*, 829 F. Supp. 171, 176 (E.D. Va. 1993); *Martinez v. Reed*, 623 F. Supp. 1050, 1054 (E.D. La. 1985), *aff'd without opinion by* 783 F.2d 1061 (5th Cir. 1986); *Ex parte Blanton*, 463 So.2d 162, 164 (Ala. 1985); *Rogers v. Rogers*, 907 P.2d 469, 471 (Alaska 1995); *Atkins v. Atkins*, 823 S.W.2d 816, 819 (Ark. 1992); *In re Marriage of Pedowitz*, 179 Cal. App. 3d

state supreme courts that have followed the PKPA in respecting the decrees of sister states in conflict with their own public policy. *Perez v. Tanner*, 965 S.W.2d 90, 94-95 (Ark. 1998); *In re Clausen*, 502 N.W.2d 649, 657 (Mich. 1993). This is not a case in which state courts of last resort have reached conflicting decisions on an important federal question, as contemplated by Sup. Ct. R. 10(b).[13]

992, 999, 225 Cal. Rptr. 186, 189 (1986); *In re B.B.R.*, 566 A.2d 1032, 1036 n. 10 (D.C. App. 1989); *Yurgel v. Yurgel*, 572 So. 2d 1327, 1329 (Fla. 1990); *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987); *Wachter v. Wachter*, 439 So. 2d 1260, 1265 (La. App. 1983); *Guardianship of Gabriel W.*, 666 A.2d 505, 508 (Me. 1995); *Delk v. Gonzalez*, 658 N.E.2d 681, 684 (Mass. 1995); *In re Clausen*, 502 N.W.2d 649, 657 n. 23 (Mich. 1993); *Glanzner v. State, DSS*, 835 S.W.2d 386, 392 (Mo. App. 1992); *Ganz v. Rust*, 690 A.2d 1113, 1118 n. 5 (N.J. Super. Ct. App. Div. 1997); *Tufares v. Wright*, 644 P.2d 522, 524 (N.M. 1982); *Leslie L. F. v. Constance F.*, 110 Misc. 2d 86, 441 N.Y.S.2d 911, 913 (Fam. Ct. 1981); *Dahlen v. Dahlen*, 393 N.W.2d 765, 767 (N.D. 1986); *Holm v. Smilowitz*, 615 N.E.2d 1047, 1053-54 (Ohio 1992); *In re of Henry*, 951 P.2d 135, 138 (Or. 1997); *Barndt v. Barndt*, 580 A.2d 320, 334 (Pa. Super. 1990); *Marks v. Marks*, 315 S.E.2d 158, 160 (S.C. Ct. App. 1984); *Brown v. Brown*, 847 S.W.2d 496, 499 (Tenn. 1993); *In re S.A.V.*, 837 S.W.2d 80, 87-88 (Tex. 1992); *State ex rel. D.S.K.*, 792 P.2d 118, 128 (Utah App. 1990); *State v. Carver*, 781 P.2d 1308, 1316 (Wash. 1990); *Arbogast v. Arbogast*, 327 S.E.2d 675, 679 (W. Va. 1984); *Michalik v. Michalik*, 494 N.W.2d 391, 394 (Wis. 1993); *State ex rel. Griffin v. District Court*, 831 P.2d 233, 237 n.6 (Wyo. 1992).

[13] Petitioner contends that whether a state must enforce a foreign custody order arising from a same-sex union or enforce a "patently unconstitutional" custody order is "unsettled and lower courts have reached conflicting results about them." Petition at 2. No citation is provided, and Respondent knows of no conflict. Petitioner later states that "In the past few years, Florida, Texas, Alabama, Virginia, Louisiana, and Oklahoma

Consequently, having failed to present any compelling reason for a writ of certiorari to be granted, the Petition should be denied.

III. PETITIONER'S DUE PROCESS AND EQUAL PROTECTION ARGUMENTS ARE MERITLESS, AND HER DUE PROCESS ARGUMENTS HAVE BEEN WAIVED.

Petitioner's last ditch effort is to argue that Virginia should make its own assessment of the fairness and substantive validity of Vermont's orders and decline enforcement. (Pet. at 27-37.) The PKPA does not permit such second-guessing of Vermont's rulings, nor does it allow an attack on the procedure employed, where, as here, jurisdiction and notice are not questions. Finally, the fact that enforcement of Vermont's orders may result in Petitioner being treated differently than other Virginia parents is the normal consequence of application of the PKPA and

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have been asked to decide whether they will recognize or enforce foreign orders arising out of custody or adoption proceedings between same-sex couples." Again, no citation is provided, although Respondent is aware of the following appellate cases involving custody or adoption and same-sex couples, *all of which mandated enforcement of the foreign order*, *Finstuen*, 496 F.3d at 1154 (Oklahoma); *Prashad v. Copeland*, 685 S.E.2d 199, 208 (Va. Ct. App. 2009); *Embry v. Ryan*, 11 So. 3d 408 (Fla. Ct. App. 2009); *A.K. v. N.B.*, No. 2070086, 2008 Ala. Civ. App. LEXIS 316 (Ala. Civ. App. May 23, 2008), *vacated*, *Ex parte N.B.*, No. 1080440, 2010 Ala. LEXIS 111 (Ala. June 30, 2010).

of the Full Faith and Credit Clause and presents no equal protection concern.

A. Petitioner's Substantive Due Process Argument Is Meritless And Has Been Waived.

Lisa complains that the Vermont courts ignored her constitutional rights as a parent in determining that Janet is a parent and is entitled to visitation. Both the Supreme Courts of Vermont and Virginia have held this argument to be waived. In its first decision in this litigation, reviewing the order declaring Respondent's parentage and entitlement to visitation, the Vermont Supreme Court held that Petitioner's argument concerning "her exclusive constitutional right to parent her child . . . was not adequately raised below and has been waived." App. 118a. Petitioner challenged that ruling in her petition for certiorari, which was denied. 550 U.S. 918 (2007). It is not the proper function of the Virginia courts to second-guess the Vermont Supreme Court's application of its waiver rules. *See Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982). Even if a collateral attack were possible, Petitioner waived the argument in Virginia; the Virginia Supreme Court specifically held that Petitioner waived her fundamental parental rights argument by failing to properly appeal the Virginia Court of Appeals' decision. App. 31a, 35a.

Moreover, it would be improper for the courts of Virginia to declare Vermont's actions unconstitutional. Petitioner's sole case holding that

a court can conduct an independent substantive due process review of a sister's state judgment is hardly compelling authority. In *In re BWS*, 371 N.W.2d 379 (Wis. Ct. App. 1985), the Wisconsin Court of Appeals held that a Michigan judgment for child support was invalid and would not be enforced because it was based on a statute that discriminated unconstitutionally against out-of-wedlock children. *Id.* at 380-81. The Wisconsin Supreme Court affirmed on entirely different grounds, and declined to consider the constitutionality of the Michigan statute, or "whether our court of appeals has jurisdiction to consider the constitutionality of a foreign statute." *In re Paternity of BWS*, 388 N.W.2d 615, 621 (1986).

Because Virginia could not revisit the constitutionality of Vermont's parentage determination, the only conflict of law among the states that Petitioner does articulate is irrelevant. She cites "at least sixteen states" that also grant custodial rights to nonbiological parents and "at least a dozen" that do not, including Virginia. Petition at 12-14. But the Virginia Court of Appeals recognized that, irrespective of whether Virginia would reach a different result in a similar case properly before its courts, Virginia had to respect Vermont's orders. App. 70a. This calculus is not altered by Lisa's characterization of the Vermont orders as "patently unconstitutional" – a facetious label, given that, by Lisa's own calculations, Vermont is in the plurality of states that would hold that her constitutional rights are not infringed by a court's preserving the parent-

child relationship between Isabella and Janet that Lisa helped create and actively fostered.[14]

B. Petitioner's Procedural Due Process Argument Is Meritless And Has Been Waived.

Additionally, Petitioner attacks the statutory construction analysis of the Vermont Supreme Court, and claims that that court unfairly applied what Petitioner claims was a new interpretation of Vermont parentage law to the dispute between Petitioner and Respondent. *See* Pet. at 28-29. Again, this argument is among the many that the Virginia Supreme Court held was barred because Petitioner failed to properly appeal it after raising it in *Miller-Jenkins I*. *Miller-Jenkins II*, App. 35a. The argument also fails on the merits because, to qualify for interstate respect, "state proceedings need do no

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[14] Notably, this Court denied certiorari in at least a half-dozen of these purportedly patently unconstitutional rulings. *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005), *cert. denied*, 546 U.S. 936 (2005); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004), *cert. denied sub nom. Clark v. McLeod*, 545 U.S. 1111 (2005); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999), *cert. denied*, 528 U.S. 1005 (1999); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005), *cert denied sub nom. Britain v. Carvin*, 547 U.S. 1143 (2006); *In re Custody of H.S.H.-K.*, 533 N.W.2d 429 (Wis. 1995), *cert. denied sub nom. Knott v. Holtzman*, 516 U.S. 975 (1995). Indeed, *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), *cert. denied*, 531 U.S. 926 (2000), was decided two months before *Troxel v. Granville*, 530 U.S. 57 (2000), on which Petitioner so heavily relies, but this Court denied certiorari four months after *Troxel* and did not remand to the New Jersey Supreme Court to reevaluate its holding in light of *Troxel*.

more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law," specifically "a full and fair opportunity to litigate." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 481 (1982). Here, Petitioner herself invoked the jurisdiction of the Vermont courts and participated fully in all proceedings. Petitioner cites no authority holding that a state can conduct an independent review of a sister state's proceedings leading to judgment for compliance with procedural due process beyond ensuring jurisdiction and notice to the parties.

Moreover, the Vermont Supreme Court's application of its statutory interpretation to Petitioner is not a due process violation; it is the essence of the judicial function. ""The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student,' [citation]. . . . A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express*, 511 U.S. 298, 311-13 (1994).

C. Petitioner's Equal Protection Claim Is Meritless.

Petitioner's final "constitutional argument" that she is denied equal protection because she is treated differently from other biological mothers in Virginia is untenable, because a litigant in a foreign jurisdiction is not similarly situated to others in the forum jurisdiction because of courts' obligation to

enforce orders of other states. *See In re Gibson*, 573 N.E.2d 1074, 1077 (Ohio 1991) ("Although Gilbert may be treated differently than some of those grandparents seeking the enforcement of out-of-state visitation decrees, we find no denial of equal protection. Grandparents who have obtained an out-of-state decree are not similarly situated to Gilbert. Unlike Gilbert, they have obtained a judgment that is generally entitled to full faith and credit in the absence of changed circumstances."); *Carter v. Carter*, 349 S.E.2d 95, 98 (Va. 1986) (as "domestic judgment creditors and foreign judgment creditors . . . are not similarly situated, statutory provisions treating them differently may not be successfully challenged under the Equal Protection Clause."). An equal protection challenge would fail for the additional reason that any disparate treatment is justified by the interest Congress and the states have in preventing child-snatching and forum shopping. *Gibson*, 573 N.E.2d at 1077 ("[I]n adopting the UCCJA, Ohio has reasonably determined that such judgments should be enforced to discourage the shuttling of children from state to state for the purpose of forum shopping. [citation] Under these circumstances, Gilbert has not been denied equal protection of the laws."); *Paton v. Brill*, 663 N.E.2d 421, 425 (Ohio Ct. App. 1995) (rejecting challenge to federal statute requiring enforcement of child support orders from sister states and explaining that "[t]he distinctions which result from the operation of the statute are reasonable and are directly related to the furtherance of solving a critical national problem: the failure of a significant number of parents to

fulfill their responsibilities to support their children.").

IV. BECAUSE PETITIONER IS A FUGITIVE HOLDING HERSELF AND THE PARTIES' CHILD AWAY FROM THE AUTHORITIES, THIS COURT SHOULD NOT GRANT THE WRIT.

Certiorari also is improper because Petitioner has secreted herself and the parties' child from law enforcement, preventing enforcement of any orders this Court might enter. "It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993). Indeed, for over 130 years, this Court has consistently refused to adjudicate appeals brought by litigants whose voluntary escape from the judiciary's control prevented assurance that orders would be followed. *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970); *Eisler v. United States*, 338 U.S. 189, 190 (1949); *Bohanan v. Nebraska*, 125 U.S. 692 (1887); *Smith v. United States*, 94 U.S. 97, 97 (1876). While this Court seemingly has not had occasion to apply the doctrine in the case of a litigant's secreting children from the authorities, many state courts have.[15]

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[15] In several cases, state courts have dismissed the appeal of a parent secreting a child or ordered the appeal dismissed if the parent did not deliver child within a specified period. *See In re Marriage of Marks*, 420 N.E.2d 1184, 1187 (Ill. App. 1981); *Strange v. Strange*, 464 S.W.2d 216, 219 (Tex. Civ. App. 1970);

This Court, in its first fugitive disentitlement case, decried the petitioner's "heads I win, tails you lose" approach in words equally applicable to Petitioner: "If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest." *Smith*, 94 U.S. at 97. Many lower courts have echoed this concern in applying the fugitive disentitlement doctrine when parents have kept children from the court's reach. *Moscona v. Shenhar*, 649 S.E.2d 191, 199 (Va. Ct. App. 2007) ("unfair[]" to hear appeal of litigant whose contempt "demonstrates his view that compliance with any orders unfavorable to him is optional."), *aff'd sub nom. Sasson v. Shenhar*, 667 S.E.2d 555 (Va. 2008); *see also Pesin v. Rodriguez*, 244 F.3d 1250, 1253 (11th Cir. 2001) (same, where appellant's "behavior to date leaves little doubt that she would defy an adverse ruling."); *Scelba v. Scelba*, 535 S.E.2d 668, 673 (S.C. Ct. App. 2000) (same where litigant showed she would not "cooperate with any order she does not fancy"); *Hemenway v. Hemenway*, 339 A.2d 247, 250 (R.I. 1975) (same where litigant showed that "if you decide in my favor, well and good, but, if you do not, I will keep the children out of your reach."). Because Petitioner's actions have rendered it impossible for

---

Michael v. Michael, 253 N.E.2d 261, 263 (Ind. 1969); *Jackson v. Jackson*, 221 So. 2d 114, 115 (Ala 1969); *In re Morrell*, 189 N.E.2d 873, 874 (Ohio 1963); *Commonwealth v. Beemer*, 188 A.2d 475, 477 (Pa. Super. 1962); *Henderson v. Henderson*, 107 N.E.2d 773, 774 (Mass. 1952); *In re Dillon*, 103 N.Y.S.2d 261, 262 (App. Div. 1951); *Pike v. Pike*, 167 P.2d 401, 404 (Wash. 1946); *Knoob v. Knoob*, 218 P. 568, 569 (Cal. 1923).

this Court to assume that any order it issues could be enforced, certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

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No. 10-177

IN THE

Supreme Court of the United States

LISA MILLER

Petitioner,

v.

JANET MILLER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

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I.

THE PETITION SHOULD BE GRANTED.

This case presents two related, but independent, substantial federal issues: the sovereignty of one state to refuse to *enforce*, as distinct from register, foreign custody orders arising form a same-sex civil union treated as marriage, and whether a receiving a receiving state must enforce foreign custody orders that are patently unconstitutional. The issues are unsettled and ripe for this Court to provide clarity and direction.

If this case did not involve such weighty matters, perhaps one could appreciate the ironic and almost surreal twists that have taken place during the six years of litigation. Unfortunately, when the life of a young child, the rights of her mother, and indeed the most basic principles upon which our government was founded are in jeopardy, it is not to be taken lightly. Several key rulings over the past few years were based on legal and factual fictions, all of which permit Ms. Jenkins to now argue that (i) she is a parent (even though she is not) and (ii) all of Ms. Miller's procedural and substantive rights have been fully and adequately litigated (even though they have not been). Specifically, Ms. Jenkins argues that:

> There is nothing new about how the law of the case doctrine was applied by the Virginia Courts even though it is

the first time in Virginia's history that the law of the case doctrine was applied to bar litigation of an issue that was not (and could not have previously been) litigated in the prior litigation between the parties, transforming the law of the case doctrine to law of the *cases* (Pet. at 35-36);

The question of whether Virginia must *enforce* the foreign custody order was previously decided by the Virginia courts even though *Ms. Jenkins* specifically chose *not* to litigate the question in prior litigation, as the statute gives her the ability to do, and the prior Virginia decisions spoke only to registration and full faith and credit, which is distinct from the issue of enforcement (Pet. at 34); and

Ms. Miller had waived her constitutional argument in Vermont because the Vermont Supreme Court said she had, even though Ms. Miller properly preserved the argument for appeal, as she specifically pointed out on her motion for rehearing to the Vermont Supreme Court, which the court nevertheless denied, perhaps because the Vermont Supreme Court had stated in its original opinion that

> even if the issue had properly been raised it was irrelevant (Pet. at 118a).

Each of these arguments rests on factual and legal fictions in which the courts changed the meaning of legal doctrines or terms and expected Ms. Miller to accede to their attempt to change legal reality. The various rulings are reminiscent of an exchange between Humpty Dumpty and Alice in *Through the Looking Glass*:

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."

Lewis Carroll, *Through the Looking Glass*, chp. VI (1969).

In this case, the Virginia and Vermont courts have attempted to change the meanings of two legal doctrines ("law of the case" and "waiver") and one legal term ("full faith and credit"). Because the law of the case doctrine was applied by the Virginia courts in a way never before applied, the opinion below does not rest on an independent and adequate state law ground that has been strictly or regularly followed (Pet. at 35-37). As a result, this Court can and should grant certiorari to address

the merits of the significant constitutional issues at stake.

In addition to the factual and legal fictions that lie at the foundation of this case, Ms. Jenkins makes several arguments that are legally inaccurate or misleading, including that:

> Res judicata prevents litigation of the enforcement issue even though the enforcement issue was not litigated in prior litigation because Ms. Jenkins chose only to litigate the issue of registration (full faith and credit) (Opp. at 12 n.5);
>
> The prior decisions concluding that Virginia is required to give full faith and credit to the foreign custody order somehow answer the separate and distinct issue of whether Virginia must *enforce* the order (Pet. at 17-24);
>
> Congress has constitutional authority to mandate enforcement, as distinct from registration (full faith and credit), because Congress says it has such authority (Pet. at 17-24); and
>
> Several other courts have already concluded that the PKPA preempts conflicting state custody laws, omitting key information that those decisions did *not* involve custody

> decisions between same-sex couples, which implicate unique issues in light of the federal DOMA and state statutes and amendments passed consistent with DOMA (Opp. at 24 & n.12).

This Petition should be granted to resolve important questions of federal law that have not been, but should be, decided by this Court concerning the scope and effect of the full faith and credit obligation in the context of a State's obligation to *enforce* a patently unconstitutional foreign child custody order arising out of a same-sex relationship.

II.

THIS COURT SHOULD NOT DISMISS THE PETITION ON THE GROUNDS OF THE FUGITIVE DISENTITLEMENT DOCTRINE.

At the outset, it bears emphasis that application of the Fugitive Disentitlement Doctrine ("the Doctrine") by an appellate court is discretionary, not mandatory. For the reasons set forth below, we urge this Court to decline to exercise its discretion to dismiss the Petition on this basis.

A.

The Doctrine Should Not Be Applied Under the Facts of This Case.

None of the cases cited by Ms. Jenkins involved application of the Doctrine against the fit, biological parent in a custody or visitation dispute *with a third party* when the biological parent objects to visitation (or custody) in favor of the third party. *But see In re Morrell*, 189 N.E.2d 873 (Ohio 1963) (grandparents had custody, with visitation to biological parents, pursuant to stipulated agreement between the parties). To apply the Doctrine to the facts of this case would be an *expansion*, not a mere *application*, of the Doctrine in a case where the underlying order patently violates Ms. Miller's fundamental rights.

Other courts have recognized the unique concerns presented when applying the Doctrine to a case implicating parental rights. "[A]pplying the fugitive disentitlement doctrine would impose too severe a sanction in a case involving parental rights. Parenthood is one of the greatest joys and privileges of life, and, under the Constitution, parents have a fundamental interest in their relationship with their children." *Walsh v. Walsh*, 221 F.3d 204, 216 (1st Cir. 2000) (citing *Troxel v. Granville*, 530 U.S. 57 (2000)); *see also March v. Levine*, 136 F. Supp. 2d 831, 859 (M.D. Tenn. 2000) (quoting favorably the language from *Walsh*). Application of the Doctrine to this case would be particularly harsh insofar as the heart of Ms.

Miller's case is her request that this Court not enforce a Vermont order that stripped her of her fundamental rights as Isabella's sole, fit, biological parent without first engaging in the constitutional analysis required by due process.

An order like the one issued by the Vermont courts in this case, which grants Ms. Jenkins parental rights without affording Ms. Miller's preference *any* weight whatsoever, plainly violates Ms. Miller's constitutional rights. To dismiss this appeal on the question of whether the Vermont visitation order, which treats Ms. Jenkins as a co-equal parent to Isabella, can be enforced in Virginia compounds the harm already caused to Ms. Miller by virtue of the unconstitutional Vermont orders.

This Court's decision in *Degen* is instructive. *See Degen v. United States*, 517 U.S. 820 (1996). In *Degen*, this Court considered the question of "whether a United States District Court may strike the filings of a claimant in a [civil] forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution" pursuant to the Fugitive Disentitlement Doctrine. 517 U.S. at 821. In 1988, a federal grand jury had indicted Degen for distributing marijuana, laundering money, and related crimes. That same day, a federal district court also unsealed a civil forfeiture complaint where the government sought to forfeit properties worth $5.5 million that were alleged to have been purchased with proceeds of Degen's drug sales or used to facilitate the sales. Degen had moved to Switzerland in 1988 and

refused to return to the United States to face criminal charges. He did, however, file an answer in the civil forfeiture suit. Invoking the Fugitive Disentitlement Doctrine, the district court granted the government's motion to dismiss Degen's filings and entered summary judgment against him. In reversing the order, this Court explained:

> The right of a citizen to defend his *property* against attack in a court is corollary to the plaintiff's right to sue there. For this reason we have held it unconstitutional to use disentitlement similar to this as punishment for rebellion against the United States, or, in at least one instance, for contempt of court. We need not, and do not, intimate a view on whether enforcement of a disentitlement rule under proper authority would violate due process. It remains the case, however, that the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked.

517 U.S. at 828 (emphasis added) (citations omitted). While admitting that there was some appeal to the idea that rough justice requires a litigant to "take the bitter with the sweet, and participate in the District Court either for all purposes or none," this Court nevertheless concluded that applying the Doctrine to Degen "would be too rough." *Id.* at 829.

If the rough justice was too harsh in *Degen* because it would have resulted in his losing the ability to "defend his *property*," how much more egregious is rough justice that would strip Ms. Miller of her ability to defend her constitutional rights concerning *her only child*. Dismissing Ms. Miller's appeal under these circumstances, with the due process arguments raised in the appeal, would violate due process guarantees and simply be "too rough."

B.

The Best Interests of the Child Dictate that the Doctrine Not Be Applied to this Case.

In all custody cases, "the best interests of the child are paramount and form the lodestar for the guidance of the court." *Florio v. Clark*, 277 Va. 566, 570, 674 S.E.2d 845, 847 (2009). That should not change even though the present question is whether to dismiss Ms. Miller's appeal under the Doctrine. *See, e.g., D.C. v. D.C.*, 988 So. 2d 359 (Miss. 2008) (even in a fugitive disentitlement case, the best interest of the child is the "polestar consideration"). The Virginia Supreme Court explained in *Florio* that "in a custody dispute between a parent and a non-parent, the law presumes that the child's best interests will be served when in the custody of its parent." *Id.* This Court has similarly found that "there is a presumption that fit parents act in the best interests of their children . . . . [S]o long as a parent

is fit, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69; *see also Stadter v. Siperko*, 661 S.E.2d 494, 497 (Va. Ct. App. 2008) (quoting *Troxel*).

It is in Isabella's best interest that Ms. Miller be permitted to press her appeal that seeks vindication of her parental rights and of Virginia's sovereign authority to define marriage and family as it has in its Code and Constitution. Surprisingly, Ms. Jenkins does not confront the well-settled Virginia and Supreme Court precedent that the law presumes, in a custody dispute between a parent and a non-parent, that the child's best interests will be served when in the custody of her parent. Rather, she asks this Court to dismiss the Petition of the child's only fit, biological parent because the biological mother did not turn her only child over to a third party who has no biological or adoptive relationship whatsoever to the child. The best interest of the child dictates that the mother's arguments concerning enforcement of a Vermont order that would be declared void if it had been rendered within the borders of Virginia be heard and decided by this Court. While Ms. Miller is not asking this Court to conduct a best interest analysis in order to modify the Vermont custody order, the best interest of the child is relevant to this Court's determination of whether to exercise its discretion to dismiss the biological mother's Petition.

C.

The Doctrine Should Not Be Applied to this Case Given the Significant Public Policy Issues at Stake.

Public policy and equity weigh against dismissal of the Petition in this case where (i) Ms. Jenkins is asking Virginia to enforce a Vermont custody order giving her parental rights over another woman's child when that order, under well-established Virginia and United States Supreme Court precedent, is patently unconstitutional, and (ii) enforcement of that order directly conflicts with express language of Virginia's Code and Constitution.

More than six years ago, Ms. Miller filed a pro se form in Vermont, asking to dissolve her civil union. It is only because Vermont allowed nonresidents to travel to Vermont and enter into civil unions that this case even exists. Vermont apparently had little, or no, concern for the obvious interstate conflict issues that would arise because of its decision. Ms. Miller and Ms. Jenkins entered into their Vermont civil union as Virginia residents, while living in Virginia. Ms. Miller gave birth to Isabella in Virginia. Ms. Miller's decision to live in Vermont for thirteen months well after the child was born changed her life, and that of her daughter, forever. Because of those thirteen months, Vermont had exclusive jurisdiction to decide any and all custody and visitation matters for six months after Ms. Miller left the state. Ms.

Jenkins responded to the civil dissolution action in January 2004 by seeking *full* custody of Isabella for herself, with only visitation to Lisa. After Vermont expressly created new parentage law from the bench (conceding that there was no law to cover the situation and then articulating a new rule), the courts there treated Ms. Jenkins as a co-equal parent to Isabella and eventually issued an order purporting to strip Ms. Miller of custody of her child.

Based on *Stadter*, it is clear that Virginia courts would deem such an order a violation of the fit, biological parent's fundamental rights. Based on Virginia's Marriage Affirmation Act and Marriage Amendment, Virginia has declared such an order, which arises out of a same-sex relationship treated as marriage, void and unenforceable. It furthers public policy not to *dismiss* this Petition, but to grant the Petition both to protect and affirm Virginia's decision concerning marriage and family, and also to keep an eight year old child with her sole, biological parent.

It also serves public policy to grant the Petition in order to avoid inconsistent and incorrect decisions in the lower court. While this case is one of first impression in the Commonwealth, and the nation, it is not the last. Courts in other states are already facing similar litigation and have looked to the outcome of this case for guidance. *See, e.g., Ex Parte N.B.*, 2008 WL 2154098 (Ala. Civ. App. May 23, 2008) (addressing the question of whether Alabama had jurisdiction to hear a parentage

petition by the biological mother after a California court had already declared her former partner to be a parent), 2010 WL 2629064, at *5 (Ala. June 30, 2010) (dismissing petition without prejudice stating that "question regarding the [child custody] judgment of the California trial court and its enforceability in Alabama may exist in light of the unequivocal nature of Alabama public policy on the issue presented in this case"); *see also Adar v. Smith*, 597 F.3d 697 (5th Cir.) (full faith and credit required Louisiana to *enforce* New York same-sex adoption decree), *reh'g en banc granted*, 2010 WL 3835126 (Oct. 1, 2010); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 684 n.24 (N.Y. Surr. 2009) (identifying the *Miller* case as the one discussing the interplay between DOMA and PKPA). This Court should give guidance to the states and lower federal courts on the underlying constitutional issues rather than leave to each of those courts the decision of whether to enforce similar foreign court orders based on possible conflicting interpretations of *Baker*'s enforcement exception and the scope of the full faith and credit clause. *Baker v. General Motors Corp.*, 522 U.S. 222 (1998).

For example, the January 4, 2010 Juvenile & Domestic Relations court order registering and enforcing the November 20, 2009 Vermont order relied on a recently decided Virginia case, *Prashad v. Copeland*, 55 Va. App. 247, 685 S.E.2d 199 (2009), which facts are distinguishable from this case, and reduced all of Ms. Miller's enforcement arguments to the short conclusion that "the entire

concept of recognition deems enforcement." *Id.* The decision did not grasp the significant constitutional distinction between *registration/recognition* (full faith and credit), on the one hand, and *enforcement* on the other. Nor did it wrestle with the fact that according to this Court's precedent, Congress lacks authority to mandate enforcement under all circumstances. Given the significant public policy, federalism, and constitutional rights issues implicated in this case, and others like it, the enforcement question needs to be decided sooner rather than later. That is particularly true given the fact that the lower courts are free to impose monetary sanctions and imprisonment for violation of the foreign orders that often patently violate the fundamental parent rights of the fit, biological parent.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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